A THESIS ON

CUSTOMARY LAW OF BUDDHIST MARRIAGES

IN BRITISH BURMA

PRESENTED

BY

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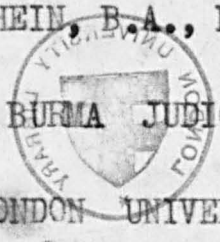

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1940.

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TEXT CUT OFF IN THE ORIGINAL

" Doubts concerning the validity of marriage are not simply serious on grounds of feeling, though everybody who has observed how much the moral and religious views on the subject are affected by the legal view, will consider them serious, even on that ground. But they are formidable for the most solid reasons. Such doubts are doubts concerning the legitimacy of children; they are doubts concerning the descent and inheritance of property. And they are especially painful, because if the questions involved in them are wrongly solved, the error or negligence of the parents is visited on unborn generations ".

" Extract from the speech of Sir Henry Maine
in the course of the debate on the
Native Converts' Marriage Dis-
solution Bill, in its pas-
sage through the Council."

SHORT ABSTRACT OF THE THESIS ON CUSTOMARY LAW OF BUDDHIST MARRIAGES IN BRITISH BURMA.

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Under section 13 of the Burma Laws Act (XIII of 1898), the Courts in British Burma must apply the Buddhist Customary Law to certain specified matters including Marriages where the parties to any suit or proceeding are Buddhists, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law.

Marriage laws are contained in the Dhammathats which are not statutes. They probably stated what the laws were when they were compiled or what they should have been in the view of the authors. In the Burmese Courts, the Judges consulted them or some of them, but did not regard their dicta as binding. The task of the Courts in British Burma has been and still is to deduce from the ad hoc decisions compiled in the Dhammathats, general principles of the Customary Law in accordance with modern habits and customs of the Buddhists. Only in these Courts is an attempt made to balance one against another and to accept the result as a rule of decision. The writer has pointed out errors in decisions arising from inaccurate English translations of the Dhammathats.

The Introductory Chapter contains a brief study of Burma, and the Burmese as a nation. The subject is divided into Chapters on Nature of Customary Law, Tests of Customary Law, Proof of Custom and Usage, Extent of Application of Burmese Customary Law, Dhammathats, Matrimonial Courts, Burmese Buddhist Marriage,

Marriage, Consent of Parents and Guardians, Consummation of Marriage, Proof of Marriage, Wives, Restitution of Conjugal Rights, Marriage with Foreigners, Maintenance, Effect of Marriage on Property, Divorce, Partition on Divorce and Effect of Divorce on Children.

As the title plainly suggests, the thesis deals only with the Customary Law as administered by the Courts established after the British annexation of Burma.

PREFACE.

In this thesis, I have endeavoured to set out as clearly as possible, the principles of Buddhist Customary Law relating to Marriage, as administered by the British Courts in Burma since the annexation. Whenever expedient, authorities affecting such principles are examined in the light of the texts from the Dhammathats, the customs and the sentiments of the Buddhist community now prevailing.

At times, I may have differed from the views of eminent authors and the learned Judges whose knowledge of the subject is undoubtedly far superior to mine, but for all that I have said, I am solely responsible. And whenever I have occasion to disagree with them, I do so with the greatest deference and prompted by only one genuine desire, to bring the Customary Law in line with the well-established principles contained in the Dhammathats in so far as they have not become obsolete through conflict with the current notions of modern Buddhist society. I now present the results of my research into the subject for information and discussion.

This is the humble work of a research student and not of a scholar or judicial officer in the service of the Crown. I have never intended that it should serve as a text book, much less an authority on the subject. All decisions of the Rangoon High Court concerning Buddhist Marriages reported up to April 1940 have been cited here.

In presenting this thesis to London University, I cannot help expressing my unbounded gratitude to the Hon'ble Judges

Judges of the High Court of Judicature at Rangoon for recommending the grant of study leave to me at a time when there was a shortage of Judicial Officers in the cadre, and to the Government of Burma for granting it thereby enabling me to proceed to England for further legal studies. In particular, I am most grateful to the Hon'ble Sir Ernest Goodman Roberts, Kt., Barrister-at-Law, Chief Justice of Burma and the Hon'ble Mr Justice Dunkley, I. C. S., Barrister-at-Law, for help and encouragement.

I further desire to acknowledge my indebtedness to the Senate of London University and the Staff of University College in the Faculty of Laws for granting me various concessions to complete my researches here as an Internal Student; to the Officers in Charge of the Libraries, especially the British Museum and India Office and India House Libraries, for providing me with all facilities for research; to the Staff of the General and Education Departments of the Office of the High Commissioner for India for their kind and sympathetic assistance in every possible way during my stay in England; to U Ba Dun, Barrister-at-Law, Secretary, and U Sein, A.T.M., Assistant Secretary to the Burma House of Representatives for the loan of rare books; and to Mr. A. Macgregor, I. C. S., (retired), at one time a Judge of the High Court of Judicature at Rangoon, and U E Maung, M. A., LL. B.,(Cantab), Barrister-at-Law, Rangoon, for supervising my studies in England and in Burma, respectively. Without their generous help which was most willingly given, this work could not have been

been accomplished.

In addition to those already mentioned above, my thanks are also due to Mr. Bradley, I. C. S., Registrar of the High Court of Judicature at Rangoon and to U Ba Thwe, B.A., A.T.M., District Magistrate, Rangoon, whose sympathetic considerations have enabled me to conclude my task in time.

I also take this opportunity of expressing my gratitude to my friend Maung Kin Oo and my nephew Mg. Hla Pe for assisting me in typing out the thesis.

Law Courts,
Rangoon, the 1st June 1940. Maung Thein.

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* Incorporated in the Burma Village Manual.

INTRODUCTION.

It is, indeed, remarkable that till the last few years, so much ignorance should have prevailed in European countries regarding Burma, and even at this moment, there is reason to believe that the notions generally entertained upon this country are extremely confused and erroneous. The very geographical conditions and outlines of the country are imperfectly known, while its internal resources, its government, its manners, its institutions - civil and military, religious and political, are only guessed from news^papers' reports and a few literary works published by some retired servants of the Crown who, during the best part of their lives, had served among a nation not unknown in world history, but at one time "second in power and greatness to China alone" of all Eastern nations.

Quite often, western people mistake Burma for Bahamas or Bermuda,, a blunder for which no justification exists, in that there is not the slightest conceivable connection between them. Its inclusion as a province in the British Indian Empire until recently, which is but an incident of history, is also responsible for another erroneous belief among the less educated that it really forms part of India. Now that Burma has been separated from India, it would be strange if people do not know more about it; it is indeed,

indeed, fortunate that a spirit of more active inquiry has recently sprung up among foreigners into the life and conditions of the Burmese as a nation.

Burma - the Land of Pagodas and Glorious Sunshine - lies to the east of the Bay of Bengal, and is bounded on the north-west and north by Chittagong, Manipur, Assam and China, on the east by Thai Land (Siam), and on the south by the Malay Penisula.

Area and Population. The provincial area covered by the Census operation (1931) is 233,492 square miles, with a population of 14,667,000. Of the said area, the undeveloped and unadministered territories measure 28,118 square miles. Thus, the Provincial area less the area covered by the undeveloped and unadministered territories is officially described as Divisional Burma or 'Burma Proper' which term has been appropriated to denote the area within the eight administrative Divisions of the Province. According to the Census Report (1931), Burma Proper is "the cradle of the Burmese race, and even now, inspite of immigration, about 94% of the population is Burmese, the remaining 6% being mainly Indians, Chins, and ~~Zebardis~~". Zerbadis."

First European Settlement. The first European settlers in Burma were the Portuguese who established factories in Martaban and Syriam, at the beginning of the sixteenth century A.D. It was not until about the year 1610 A.D. that the East India Company opened factories at Bassein, Syriam, Prome, and several other stations.

Burmese Wars. At the conclusion of the First Burmese War which broke out in 1824 A.D., the Provinces of Arakan and Tenasserim were ceded to the British. The town of Rangoon was occupied by the British for some time, but was surrendered as soon as the terms of the Treaty entered into were complied with. The Second Burmese War broke out again in 1852 A.D. and by a second Treaty that concluded it, the entire Province of Pegu including the town of Rangoon, was ceded to the British. Again in 1885 A.D., the Third and the last War was fought and the British Expedition occupied Mandalay - the capital of the last Burmese kingdom - on the 29th November, 1885 A.D. King Theebaw was dethroned and the whole of Upper Burma was annexed to the British Empire, on the 1st day of January 1886 A.D.(a). Since then, Burma became part of the Indian Empire, and it remained as such until the 31st March, 1937 A.D.

Form of Government. By the Government of Burma Act, 1935(b), Burma was separated from India as from the 1st April 1937 A.D. in accordance with the genuine desire of the Burmese. It is now a separate unit in the British Commonwealth of Nations and is governed by a Governor appointed by His Majesty (c).

(a) Administration of Burma by Ma Mya Sein, p.125.

(b) 26. Geo. 5. Ch. 3.

(c) Sec.3 (Ibid.

There are two Chambers of Legislature known respectively as the Senate and the House of Representatives. Of thirty-six members of the Senate, eighteen are nominated by the Governor in his discretion, and the rest are elected by the members of the House of Representatives, whereas, all one hundred and thirty-two members of the House of Representatives are elected by the people (d). The normal life of the Senate is seven years while that of the House of Representatives is five years (e).

The Governor administers the Reserved subjects (f) with the aid and advice of his Counsellors, and the Transferred subjects with that of the Council of Ministers. The Ministers are chosen by the Governor at his discretion (g) to represent the strongest political party or group of parties in command of the House of Representatives for the time being. The President of the Senate and the Speaker of the House of Representatives are elected by the members of each Chamber (h).

Services. The Judges of the High Court of Judicature at Rangoon (i) and the Auditor-General (j) are appointed by His Majesty. The Governor appoints the Financial Adviser (k)

(d) Sec.17 G.B.A.
(e) Sec.18 Ibid.
(f) Sec.7 Ibid.
(g) Sec.6 Ibid.
(h) Sec.211 Ibid.
(i) Sec.66 Ibid.
(j) Sec.81 Ibid.
(k) Sec.11 Ibid.

Adviser, Advocate-General (l), members of the Burma Frontier Service (m), and District and Sessions Judges (n).

Appointment to the Burma Civil Service (Class 1) and the Burma Police (Class 1) and some other important Offices is made by His Majesty's Secretary of State (o). Commissions in any naval, military and air forces raised in Burma are granted by His Majesty or the Governor who is authorized in this behalf(p). Appointment to certain specified services in the Defence Department is made by His Majesty in Council, or in such manner as he may direct (q).

The Public Service Commission composed of a Chairman and two members appointed by the Governor in his discretion, makes all other appointments to the Civil Services in Burma (r). It holds competitive examinations for recruitment to various services (s), and promotions and departmental punishments of civil servants are made by the Governor in consultation with the commissioners (t) who are supposed to be above political influence.

High Court. The High Court of Judicature at Rangoon is a court of record, and it consists of a Chief Justice and other

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(l) Sec.12 G.B.A.
(m) Sec.110 Ibid.
(n) Sec.113 Ibid.
(o) Sec.101,103 & 122 Ibid.
(p) Sec.92 Ibid.
(q) Sec.91 Ibid.
(r) Sec.119 Ibid.
(s) Sec.120 Ibid.
(t) See.Ibid.

other puisne Judges appointed by His Majesty by warrants under the Royal Sign Manual. The Governor may appoint additional Judges from time to time as necessity arises, but the total number shall not at any time exceed the maximum number fixed by His Majesty in Council (u). The High Court has superintendence over all courts for the time being subject to its appellate jurisdiction, and has rule-making powers (v), but unless otherwise provided by an Act of the Legislature, it shall not have any original jurisdiction in any matter concerning revenue, or any act ordered to be done in collection thereof according to the usage or practice of the country, or the law for the time being in force (w). An appeal from the decision of this Court lies to His Majesty in Council only on a question of law, subject to the provisions of section 22 of the Judicial Committee Act, 1833 (which relates to time for appealing). But His Majesty may grant special leave to appeal in any case in exercise of his prerogative right (x).

Increase in Population. Burma is the land of the Buddhists. According to the Census Reports, the Buddhist population inc increased from 11,202,000* in 1921 to 12,348,000 in 1931, i.e.,

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(u) Sec.81 G.B.A.

(v) Sec.85 Ibid.

(w) Sec.86 Ibid.

(x) Sec.87 Ibid.

* The figures given in this work are rounded to the nearest thousand.

i.e., by 10.23%. On the other hand, non-Buddhists increased from 1,967,000 (1921) to 2,299,000 (1931), i.e., by 16.89%. The large increase in the number of non-Buddhists is due to immigration mainly of Indians and Chinese. It is true that non-Buddhists have been increasing at a greater rate than the Buddhists for many decades, and that is apparent from the fall of the Buddhist population from 88.62% (1921) to 84.30% (1931).

Chinese. Of 194,000 Chinese (1931), 43,000 are recorded as Buddhists as against 29,000 (1921). The number of Animists and Confucians has declined mostly due to conversion to Buddhism and Christianity.

Hindus. In 1931, the number of Hindus was 571,000 which was 3.90% of the total population as against 3.68% (1921). They formed 20% of the urban, but only 2% of the rural population.

Muslims. They numbered 501,000 (1921) as against 585,000 (1931). The increase was as high as 16.8%. The bulk of Muslims belong to Indian and Indo-Burman races. There was a considerable number of inter-marriages between Indian-Muslims and females of the indigenous races of the province, and their off-spring generally become Muslims. It is apparent that a large increase in the number of Muslims is due to these mixed marriages. Muslims formed 4% of the entire population.

Christians. They numbered 331,000 (1931) which was 2.26% of the total population. It is noticed that there has been a steady increase in the Christian population, due to

to conversion of a large number of Animists of the hill tribes to Christianity.

Occupation. According to the Census Reports (1931) under the heading " Distribution of the working population by occupation ", 70% of the workers are engaged in the production of raw materials, and 23% in industries, transport and trade, the remaining 7% being made up of slightly over 1% engaged in the public services, about 3% in the professions and liberal arts, and nearly 1% in the domestic service; only about 1% have occupations which are insufficiently described.

The fact that Burma is an agricultural country is apparent in that out of nearly 4,252,000 male and 1,929,000 female working population, about 2,922,000 males and 1,205,000 females were recorded in the Census Reports (1931) as engaged in agriculture, representing 69% and 62% of the total numbers of male and female workers respectively.

Trade. The chief trade is in rice, timber, beans, cotton, lead, silver, tin, petroleum and its by-products, rubber and precious stones, mostly rubies. During the year 1936-1937, the sea-borne trade of Burma with the British Empire and foreign countries reached the value of Rs.32,37,00,000 of which about nine-tenths passed through the port of Rangoon. The value of exports to India alone reached the figure of Rs.21,10,01,000 (y). The principal ports other than Rangoon

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(y) Annual Report of the sea-borne trade of Burma, 1936-37. Abstract table 1 at page 1.

Rangoon are Akyab, Bassein, Moulmein, Tavoy and Mergui from each of which there was considerable export of rice or metals and ores.

The dominant feature of the commerce of Burma is rice, the value of total export thereof during 1936-37 to the British Empire and foreign countries being Rs.8,91,98,000 (z) of which Rs.6,20,41,000 represents the value of trade with India alone (a)

Next in importance is the trade in mineral oils, petrol, and lubricating oils, the export whereof to India in 1936-37 was valued at Rs.17,33,87,000 (b). Burma has one of the largest oil refineries, in the world.

Burma possesses a wealth of minerals. Lead and silver are mined on an extensive scale at Namtu and Bawdwin by the Burma Corporation - one of the largest mining and smelting concerns in the world. These metals together with zinc, tin, copper, and wolfram were exported to the British Empire and foreign countries to the value of Rs.5,12,89,000 in 1936-37 (c).

The forests of Burma are rich in precious timber, especially teak. The value of exported wood and timber to India alone during 1936-37 was Rs.2,27,17,000 (d).

(z) Annual Report of the sea-borne trade of Burma, 1936-37. Abstract Table 7 @ 32.

(a) Ibid. Abs. Table 7A @ 36-38, 40, 42 & 43.

(b) Ibid. Part IV. Statement 2 @ 413.

(c) Ibid. Abs. Tables 7 @ 33, 7A @ 36, 40, 42 & 43 and Part IV. Statement 2 @ 420.

(d) Ibid. Statement 2 @ 420.

Coal is imported in large quantities from Bengal. Mineral oils, especially crude oil, are imported to serve as fuel since the high quality of Burma oils is far too valuable to allow their use for this purpose.

The import which shows the highest value is cotton goods. In 1936-37, the value of cotton goods imported from India alone was Rs.2,32,20,000 and from all countries was Rs.10,84,83,000 (e). Metals, machinery, jute, grain, hardware, sugar, railway plant, provisions, and liquors are among the goods mostly imported.

Agriculture. As previously stated, Burma is an agricultural country. In 1931, the total area under cultivation was over 20,124,000 acres as compared with 20,667,000 acres of cultivable waste other than fallow, a large proportion whereof could only be cultivated by incurring expenditure on costly irrigation, drainage and embankment schemes. In the Central zone and the coast strip of Arakan, there is very little land available for extension of cultivation. According to the Season and Crops Reports, floods appear to be as frequent a cause of failure of crops as drought, but there never has been any real shortage of food supply. On the other hand, Burma exports her surplus of rice to Europe, and in 1931, the tonnage of actual export was 3,530,000 as compared with 2,685,000 in 1921.

(e) Annual Report of the sea-borne trade of Burma, 1936-37. Part IV. Statement 2 @ 420.

Language. Burmese is the main language of the Province; and in a few districts where the number of speakers of Burmese is small, the languages spoken are very closely related to Burmese, e.g., Arakanese in Akyab, Yanbye in Kyaukpyu, Tavoyan in Tavoy, Merguese in Mergui. In 1931, out of the total population of 14,647,000, it was recorded that 8.842,000 speak Burmese, 222,000 speaks Arkanese, 327,000 speak Yanbye, 159,000 speak Tavoyan and 101,000 speak Merguese. Other indigenous languages are spoken by 3,790,000, Indian languages by 1,080,000, English by 27,000 and other languages by 4,000 only.

Educational Institutions. They may be divided into two, viz: private and public. The former consists of largely monastic schools, to be found mostly in villages where Buddhist monks are both spiritual and temporal teachers. The Census Report (1931) shows a decrease in the number of pupils in private institutions, but in public institutions, the number has increased by 189,000 or 53%, males by 92,000 or 38%, and females by 97,000 or 83% as compared with the figures for the Census (1921). The large increase in the number of female pupils is in accordance with literacy figures, the proportion of literate females aged 5 years and above having increased from 112 per mille (1921) to 165 (1931). According to the Annual Report on Public Instruction in Burma for 1938-39, the total number of girls under instruction in recognized and unrecognized schools was 262,000 an increase

increase of 20,000 over the figures for the preceding year. Literacy. The number of persons aged 5 and above recorded as literate in any language was 3,636,000 males and 1,010,000 females (1931). The proportion of literates (both sexes) had increased from 317 per mille (1921) to 368 per mille (1931), the increase for males being 510 to 560 per mille and for females from 112 to 165 per mille. Thus, the proportion for females had increased by nearly 50%. Literacy among females in Burma had grown very rapidly during the last three decades, and in 1931, it held first place among the Provinces in the Indian Empire. It will be noted that the proportion of literates is higher than that in any other Provinces of India. This is due to the high proportion of literates among the Buddhists. The following is the comparative table showing literacy among some of the major Provinces of India and Burma :-

Number per mille of persons aged 5 and over who are literate.

Province.	Literate in any language.			Literate in English.		
	Persons.	M.	F.	Persons.	M.	F.
Bengal.	110	180	32	25	43	5
Madras.	108	188	30	15	26	4
Bombay.	102	167	29	18	29	6
Burma.	368	560	165	13	20	5

As regards literacy in English for males, Burma had a smaller proportion than Bengal, Madras and Bombay, the proportion in Bengal being about double of what it was in Burma in 1931. This is probably due to the late annexation of Burma by the British. The proportion of female literates in English in Burma is greater than it is in most of the Indian Provinces, being exceeded only in Bombay.

In schools and colleges, Burmese is taught as the principal vernacular, although the medium of instruction in scientific subjects is English. It is, however, hoped that Burmese will soon replace English as the medium of instruction at the University, just as Japanese is now in Japan.

Civil Condition. There is no problem of child-marriage in Burma as in India. The Customary Law of the Burmese allows widow-marriages. According to the Census Report (1931), no marriage of either sex below 14 years was recorded among the Burmese. Girls generally marry at 16, and boys at 20 years.

Very few Burmese women married Hindus, whereas, inter-marriages with Muslims were not uncommon. A large number of Chinese have permanently settled down in Burma and many of them have Burmese wives. The Arakanese, Shans, Chins, Karens and other minor tribes generally marry among themselves.

Marriage among the Burmese is purely a consensual contract. It is non-religious. No ceremony is required for its validity.

Polygamy is still prevalent on a small scale among the

the Burmese.and sanctioned by the Customary Law (f). But polyandry is unknown. Exogamy and endogamy are not prevalent.

Divorces are comparatively few among the Burmese. It is as easy to dissolve as to contract a marriage. The right to affect a divorce by mutual consent is recognized by Burmese Customary Law.

The Customary Law of Buddhist marriages will be fully discussed in this thesis.

The People. The Burmese are naturally peaceful and law-abiding citizens. It is often said with accuracy that they are very good friends, but very bad foes. They are strong and courageous. They possess artistic talents of a high order. Regarding their general character, the writer desires to quote with approval, the following extract from the editor's preface to "An Account of an Embassy to the Kingdom of Ava in the year 1795" by Lieutenant-Colonel Michael Symes: "That the Birmans are not undeserving the attention which this country seems now disposed to give them, is abundantly evident both from our having found them such formidable antagonists in war, and from our knowledge of their importance as auxiliaries and commercial neighbours in time of peace. Some of the most experienced officers of the British army have borne testimony to the progress made by the Birmese in the art of war - having had various opportunities of seeing

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(f) K.M.D.(II) Sec.253.

seeing them take up and maintain their positions 'with a judgment' in the language of Sir Archibald Campbell, 'which do credit to the best instructed engineers of the most civilised and war-like nations'. That they are also every year becoming more proficient in the various arts of peace, and fast rising in the scale of Oriental dynasties, is equally undoubted; and to borrow the words of Colonel Symes, 'as they are not shackled by any prejudices of castes, restricted to hereditary occupations, or forbidden from participating with strangers ~~from~~ in every social bond, their future advancement will, in all probability, be rapid'. 'At present,' he continues, 'so far from being in a state of intellectual darkness, although they have not explored the depths of science, nor reached to excellence in fine arts, they yet have an undeniable claim to the character of a civilized and well instructed people. Their laws are wise with sound morality; their police is better regulated than in most European countries; their natural disposition is friendly and hospitable to strangers; and their manners rather expressive of manly candour than courteous dissimulation. The gradations of rank, and the respect due to station, are maintained with scrupulosity which never relaxes. A knowledge of letters is so widely diffused that there are no mechanics, few of the peasantry, or even the common water-men (usually the most illiterate class) who cannot read and write in the vulgar tongue. All these things considered, it is impossible

impossible to avoid coming to our author's conclusion that the Birmans bid fair to be a prosperous, wealthy and enlightened people". This written of the Burmese in 1827 applies with greater force of accuracy to present day conditions, and their Customary Laws which the writer will discuss in the following pages will, it is hoped, convey such information as will afford atleast an adequate recompense for the labour of perusing them.

CHAPTER I.

NATURE OF CUSTOMARY LAW.

It is beyond the scope of this study to enter into a detailed analysis of the term "Customary Law", but it is, perhaps, desirable to trace its origin briefly. It is universally admitted that where there is an assemblage of persons united together for common purposes or ends, there must be some notion of law, for as Cicero observed, mankind has a genius for law. In Burma as in every other country, the family group is the unit of society among the peoples, and the supreme power lies originally in the patriarch or head of the family. The towns which are scattered all over the country, have grown from villages founded and occupied by single groups, the members whereof, bound together by ties of kindred, possess rules of life naturally simple which are observed not so much out of fear of any undesirable results which their violation or breach may cause, but in that they are in accordance with the general notions, views and convictions obtaining among them. With the extension of the family groups, the growth of the village community and the increase in the number of house-holds, the public affairs of the community are guided by the patriarch of the family now the headman of the village who acts with the assistance of the village council composed of the heads of other family groups or house-holds, and possibly, other men of mature age and wisdom. Thus, the village council may be said to represent the fountain-head of the common life, and its

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its determinations find expression in the popular voice.

In such a community, there exists much of those positive rights and obligations constituting the Austinian Positive Morality, which may be called the customary law, and which each person has the right to enforce against his neighbour either through the village council sitting and acting judicially as a local tribunal, or by invoking as just stated, the silent force of popular sanction according to long established and well known usage which more or less possesses an imperative attribute, and in consequence, the character of law. Hence, law in the earliest stage of its existence is no more than the will and conviction of a community whereby a given rule is adopted by common consent to govern the conduct of its members in their relations with one another. Holland therefore, rightly holds that custom was law before it received the stamp of judicial recognition (a).

As by a repeated course of action a habit is acquired, so from isolated instances an usage springs up, which in process of time, ripens into customary law. It is therefore, said that law is built upon usage. It acquires its governing force by publication or common observance and it is therefore, correct to say that it exists by usage. It does not necessarily emanate from a political superior, but is based on utility or social and communal necessity, and is enforced by the express or tacit sanction of the collective will of the people (b). The Burmese do not require divine or political authority as

(a) Holland's Jurisprudence. pp. 60-61. (b) Ibid. pp. 57-58.

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as the basis of their usages. "Their antiquity is by itself assumed to be a sufficient reason for obeying them (c)."

Custom often grows and fashions itself according to the internal economy of the community. "The usages which a particular community is found to have adopted in its infancy and in its primitive seats are generally those which are on the whole, best suited to promote its physical and moral well-being.(d)."

"Customs may not be as wise as laws, but they are always popular. They array upon their side alike the convictions and prejudices of men. They are spontaneous. They grow out of man's necessities and invention, and as circumstances change and alter and die off, the custom falls into desuetude and we get rid of it (e)."

In that it is nowhere forbidden to make new laws as has been done since time immemorial, customary law is continually being generated among a people advancing in civilization as the Burmese are, and it will continually grow with the march of time. The views of the Roman lawyers that custom not only interprets but also abrogates law, therefore, seems to be correct. In the famous case of Collector of Madura v. Mootoo Ramliga (f)*, their Lordships of the Privy Council observed that clear proof of usage will always outweigh the written text of law.

(c) Maine's Village Communities. p.68.

(d) Maine's Ancient Law. p.16.

(e) Mr. Disraeli on the Irish Land Bill (11th March 1870.) Hansard Vol.199.col.1806 at 1815.

(f) Moore's Indian Appeals. p.397. (Vol.12.)

* Sometimes cited as 'Ramnad Case.'

Customary law is flexible; it enforces new customs and usages to suit the fuller and more complex life of the people whom it seeks to govern. Bentham said: "To reject innovation is to reject progress; in what condition should we be if that principle had been always followed ? All which exists has had a beginning; all which is established has been innovation. Those very persons who approve a law today because it is ancient, would have opposed it as new when it was first introduced (g)."

Thus, at no stage of its history can customary law be said to be complete; old customs died out yielding place to new. Conservatism is foreign to customary law. Hence, the Courts that enforce it must always be on the alert to recognize its changes wrought by evolution of time. The late Mr. Hodgkinson, Judicial Commissioner of Upper Burma, had expressed a useful warning that "care must be taken in applying to cases at the present day, principles derived from an archaic society and now materially affected in their application by the existing order of things (h)".

(g) Bentham's Theory of Legislation by Hildreth p.68.

(h) Chan Toon's Principles of Buddhist Law. p.6.

CHAPTER II.

TESTS OF CUSTOMARY LAW.

According to the modern English view (a), custom can only become law if it is recognized as such by the Sovereign. This recognition may be bestowed by the legislature (as when an Act of Parliament adopts a custom), or by the Courts (as when a custom is embodied in a judicial decision).

Assuming that the assent of the Sovereign is necessary to convert custom into law, it may be asked when custom acquires legal sanction. Austin considered that a custom becomes legally binding from the date at which the Act of legislature, or the judicial decision incorporating it, comes into operation, while others thought that it becomes so as soon as it satisfies certain conditions required by law as essential to its validity, even before it is expressly sanctioned by an Act of Parliament, or has received recognition by judicial decision. Salmond, therefore, said that Custom is law not because it has been recognized by the Courts, but because it will be so recognized, in accordance with the fixed rules of law, if the occasion arises.

Blackstone said that custom to obtain legal validity in English law, must comply with the seven requisites. It must be (i) immemorial - i.e., it must have been followed so long that "the memory of man runneth not to the contrary"; (ii)

(a) Wise's Outlines of Jurisprudence. 0.113.

(ii) continuous - i.e., the observance must not have been interrupted; (iii) peaceable and acquiesced in - i.e., not subject to contention or dispute; (iv) reasonable, or atleast not unreasonable; (v) certain - i.e., not vague and indefinite; (vi) compulsory - i.e., it must not be optional to follow it or not, and (vii) consistent with other customs. To that he added that if the custom derogates from the Common Law, it must be strictly construed and that it must not be contrary to the provisions of an Act of Parliament or an infringement of the prerogative of the King. If a custom complies with the said conditions, it becomes legally binding, whether or not it has been approved by the legislature or the Courts.

But it cannot be too strongly emphasised that there is great danger in too indiscriminately applying the technicalities of the English law to a country like Burma whose institutions, popular traditions, and prejudices are so entirely different from those of England. Burmese customs, it is submitted, should not be tested by the arbitrary rules peculiar to English law, but rather by the rules of universal applicability. In that connection, Sir Erskine Perry wrote (b): "This custom has not only been attacked on the scope of unreasonableness, but has been tested by every one of the seven requisites which

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(b) Perry's Oriental Cases. p.120.

which Blackstone has laid down for the validity of an English custom. It may be asked however, and I did ask why the various special rules which have been laid down in any particular system, and some of which clearly have no general applicability, should be transferred to a state of things to which they have no relation. ... I apprehend that the true rules to govern such a custom are rules of universal applicability, and that it is simply absurd to test a Mohammedan custom by considerations whether it existed when Richard I returned from the Holy Land, which is the English epoch for dating the commencement of time immemorial".

The universal tests may be summarized as follows :

(i) the alleged custom must be reasonable, or not unreasonable;

(ii) it must have been long established i.e., not necessarily ancient, but continuous and notorious;

(iii) It must be certain or definite; otherwise, it becomes incapable of being administered through a Court of law; and

(iv) it must have been uniformly and universally observed by the community to which it is attributed, as binding law and not merely of choice; and

(v) It must not be incompatible either directly or by necessary implication, with any enactment of the legislature binding on that community in a similar matter.

Of the above requisites, the element of reasonableness is very important and is always very carefully scrutinized by the Courts. An alleged custom so entirely in favour of one party as to be fundamentally unjust to the other, cannot be considered as reasonable (c). Similarly, a custom which is repugnant to natural justice, equity and good conscience should not be enforced on ground of unreasonableness. Nor can a custom which is opposed to morality and public policy be supported at law (d).

A custom that derogates from the general law applicable to a person must be proved by clear and unambiguous evidence, by him who asserts it (e). If a person prima facie governed by a custom, claims exemption from it, the burden of proving the exemption lies on him (f). Where the existence of any custom is in dispute, the onus is on the person relying upon it.

Some of the cases cited above are not under Burmese Buddhist Law, but the principles are applicable.

(c) Ma Yin Mya v. Tan Yauk Pu, 5.Ran.406.

(d) Keshaw v. Bai Gandhi. 39. Bom. p.491.

(e) Bubarao v. Radha. 52. Bom. p.497.

(f) Sahadev v. Kusum. 2. Pat. p.230. P.C.
Ma Tin v. Doop Raj Barua. II.U.B.R. (1892-96) p.308.

The decision of the Court that a particular custom is valid merely recognizes it as being law, but does not give it any greater force or authority than in ever had before. But there is this advantage: the validity of the custom is now definite, and in subsequent legal proceedings, it will not be necessary to prove that custom again by calling witnesses. It will be sufficient to refer to the decision in question (g).

It seems, therefore, that judicial recognition is not essential to the validity of a custom as has been rather hastily held by the Madras High Court in the case of Narasammal v. Balaram (h). For, the effect of such a rule places an unnecessary limitation on the generality of the Privy Council dictum in the Rammad case (i) in that it would confine the class of binding customs to those which had by chance come up before the Courts and would exclude probably the better ones which had never been questioned before.

(g) Sher Mahomed v. Mt. Jawahar (1938) A.I.R. Lahore. p.309

(h) 1. Mad. p.424.

(i) Ante. p.3.

CHAPTER III.

PROOF OF CUSTOM AND USAGE.

We have dealt in the last chapter what the tests of customary law are, and on which of the parties to a suit or proceeding the burden of proving it lies. It is necessary to state here briefly in what way or by what kind of evidence, customs or usages may be proved before a tribunal of justice. In Burma, the law of evidence dealing with this subject is contained in the Evidence Act (I of 1872). The writer proposes to reproduce the relevant provisions of the Act hereunder.

Where the question before the tribunal is as to the existence of any right or custom, evidence of any transaction by which the right or custom was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence is relevant (a). Statements made by a person who cannot be called to give evidence, or contained in any deed, will or other document which relates to any such transaction are also relevant (b). Particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from, are likewise relevant (c).

Where the existence of any general custom or right is in question, the opinions as to the existence of such custom or right, of persons who would be likely to know of its existence are relevant (d). Statements of opinion as to the existence

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(a) Sec.13(a) E.A.
(b) Sec.32(7) E.A.
(c) Sec.13(b) E.A.
(d) Sec.48 E.A.

existence of any public right or custom, which were made before any controversy on the point had arisen, are admissible, if the person who made them cannot be called to give evidence (e). The opinions of persons who have special means of knowledge as to the usage and tenets of any body of men or family are also relevant (f).

As previously stated, a custom is a rule which in a particular district, class or family has from long observance, obtained the force of law, whereas, a usage though a rule of similar type, has not risen to the level of a custom.

Where a person is called to give evidence as one who has special means of knowledge as to a particular custom or usage, the fact that he has special means of knowledge thereon shall be proved before his opinion is admissible, and cross-examination on this point may be interposed with the leave of the Court.

It has been said that a custom which has been judicially recognized need not be proved again in a subsequent suit or legal proceeding: this however, does not hold good where that custom has been altered, modified or abrogated by a statutory enactment, or is opposed to a new custom having the force of law. The custom enforceable at law is not one which

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(e) Sec.32(4) E.A.

(f) Sec.49 E.A.

which our fore-fathers adopted, but one which prevails at the present day. But whenever a party relies upon a new custom, strong evidence must be adduced to prove that it has acquired the force of law to justify judicial recognition and that it is not inconsistent with any statute for the time being in force.

CHAPTER IV.

EXTENT OF APPLICATION OF BURMESE CUSTOMARY LAW.

We are not concerned here with Burmese Customary Law as it was administered in the days of Burmese Kings, nor should the writer be expected to enlarge the scope of his study to include any branch of customary law other than that relating to marriage and in force in British Burma, i.e., Burma after the British annexation. Suffice it to say that Burmese Customary Law as contained in the Dhammathats was, before the annexation, applied as the lex loci to all inhabitants of the realm by the Royal Command. Religion and nationality were immaterial (a).

After the British annexation of Burma, Buddhist Law came to be recognized as the lex fori of our Courts in questions regarding succession, inheritance, marriage or caste, or any religious usage or institution, in cases where the parties were Buddhists, except in so far as such law had been altered or abolished by a legislative enactment, or was opposed to any custom having the force of law in British Burma (b). This enactment was supplemented by the Burma Laws Act (XIII of 1898) section 13 whereof in dealing with the relevant point reads as follows :

"(1) Where in any suit or other proceeding in Burma it is necessary for the Court to decide any question

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(a) May Oung's L.C. p.10.

(b) Sec.4. Burma Courts Act (VII of 1875).

question regarding succession, inheritance, marriage or caste, or any religious usage or institution,

(a) the Buddhist law in cases where the parties are Buddhists,

(b) the Mohammedan law in cases where the parties are Mohammedans, and

(c) the Hindu law in cases where the parties are Hindus,

shall form the rule of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law."

"(2) Subject to the provision of sub-section (1) and of any other enactment for the time being in force, all questions arising in civil suits instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature of Fort William in Bengal in the exercise of its original civil jurisdiction."

"(3) In cases not provided for by sub-section (1) or sub-section (2), or by any other enactment for the time being in force, the decision shall be according to justice, equity and good conscience."

"(4) This section does not extend to the Shan States."

It is clear from sub-section (1) that Buddhist Law is purely local and is not therefore, applicable to the Buddhists living abroad. That both parties to the suit or proceedings

proceedings shall be Buddhists is also a condition precedent to its application.

By Buddhist Law is meant the Customary Law of the Burmese who in general, profess the Buddhist religion. It has nothing to do with ~~the~~ Buddhist doctrine as preached by the Lord Buddha - the founder of the Buddhist religion. As pertinently remarked by Page C.J. in Phan Tiyok v. Lim Kyin Kauk (c), Burmese Customary Law is regarded as Buddhist Law not because it is part and parcel of the Buddhist religion, but because it is the personal law that governs the Burmans who are Buddhists. Thus, when we speak about Buddhist Law or Burmese Customary Law, we must remember that we are referring to what is popularly termed Burmese Buddhist Law.

The term "Buddhists" appearing in sub-section (1) of section 13 of the Burma Laws Act (1898) relates prima facie to all the Buddhist inhabitants of British Burma (except the Shan States). It therefore, applies to all indigenous races of Burma who profess the Buddhist religion. But the question whether it includes the Buddhists of foreign nationalities has often been mooted before the Courts in Burma. Until recently it was taken as judicially settled but for a dissentient note struck by Burgess J.C., in Ma Tin v. Doop Raj Barua (d) that

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(c) 8. Ran. p.57. F.B.

(d) This case relates to a Buddhist Mug from Chittagong. The learned Judicial Commissioner remarked : "Prima facie as a Buddhist, deceased would come under the Buddhist Law of the country at large and the burthen of proving any special custom or usage varying the ordinary Buddhist rules of inheritance would be on the person asserting the variance." II.U.B.R.(1892-96) p.608.

that Burmese Buddhist Law is not the Buddhist Law applicable to the determination of questions relating to succession or inheritance to the estates of the Buddhists of foreign nationalities residing in Burma (e).

This view however, was recently challenged before the Judicial Committee of the Privy Council in Tan Ma Shwe Zin and others v. Koo Soo Chong and others (f). In that case, the Rangoon High Court held that Chinese Customary Law governs succession to the estate of a Chinese Buddhist domiciled in Burma, inasmuch as there is no Buddhist law applicable to Chinese Buddhists. In appeal to the Privy Council, Sir George Rankins who delivered the judgment of the Board, discussed the applicability of sub-section (1) of section 13 of the Burma Laws Act (XIII. of 1898) and said that difficulty in the application of that section has arisen out of the immigration into Burma, of Chinamen some of whom profess the Buddhist faith although there is no Chinese form of Buddhist law. It was pointed out that as regards succession and inheritance, the Chinaman who is a Buddhist is, in China, governed by customs and laws which are not connected with the religious beliefs of the Buddhists and which are applied equally to Chinamen who are not the Buddhists. Dealing with all relevant authorities on the subject, their Lordships concluded that a

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(e) Tan Ma Shwe Zin v. Tan Ma Ngwe Zin 10. Ran. p.97.

(f) R.L.R. (1939) p.548.P.C.

a Buddhist, comes within the term "Buddhists" in clause (a) of sub-section (1) of section 13 of the Burma Laws Act, 1898 and that he cannot be excluded therefrom either on the ground that he is not a Burmese Buddhist, or because the law which governs him in China is not a specifically Buddhist or even a religious law. Their Lordships are aware that some difficulty and inconvenience may arise from applying to Chinese Buddhists, a law which is different from that applicable to them in China, but they considered that to be a matter for reconsideration by the legislature. In their Lordships' opinion, "it is a problem de lege ferenda and is not to be solved by interpreting the section in a sense of which it does not admit." Expressing complete agreement with the decision of Burgess J.C., in Ma Tin v. Doop Raj Barua (g), their Lordships held that prima facie, inheritance to the estate of a Chinaman who was domiciled in Burma and was a Buddhist, is governed by the Buddhist Law of Burma, and the burden of proving any special custom or usage varying the ordinary Buddhist rules of inheritance is on the person asserting the variance. This decision, it is submitted, implies that the Buddhists of all nationalities domiciled in Burma are, subject to the proviso aforesaid, governed prima facie by Burmese Buddhist Law in matters relating to succession, inheritance, marriage or caste, or any religious usage or institution, by virtue of

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(g) Ante. p.15.

of sub-section (1) of section 13 of the Burma Laws Act, 1898. All previous decisions of the Rangoon High Court on the point to the contrary have thus been over-ruled.

The pronouncements on the effect of section 13 of the Burma Laws Act, 1898 on matters relating to marriage between a Burmese Buddhist and a Buddhist of foreign nationality were unfortunately, inconsistent in the past. That a valid marriage is possible between them has never been doubted, but the judicial requisites laid down for compliance seem to have been altered from time to time. In Sein Kyi v. Ma E (h), the marriage between such parties was required to be celebrated in accordance with the customs of both the Burmese and Chinese. In Ma Thein Shin v. Ah Shein (i), however, the adoption of Chinese ceremonies at the marriage was considered not indispensable, and in Saw Maung Gyi v. Ma Thu Kha (j), such ceremonies were held to be unnecessary, the consent of the parents of the Burmese girl and mutual consent of the parties to become husband and wife being made the only requisites of a valid marriage. This, of-course, was the view in Lower Burma. In Upper Burma, however, it was held in Wa Foon v. Ma Thein Yin

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(h) 8. L.B.R. p.399.

(i) 8. L.B.R. p.222.

(j) 8. L.B.R. p.208.

Wa Foon v. Ma Thein Yin (k) that certain ceremonies and formalities must be adopted, that the consent of the parents of the parties to the marriage must be obtained, and that the respective positions of the parties must be such that a marriage between them will not be invalid. For reasons that will soon be apparent, the writer does not propose to dilate upon each of the aforesaid requisites. Suffice it to say that according to the Upper Burma view, no marriage between a Burmese Buddhist woman and a Buddhist Chinaman was considered legally binding unless the aforesaid requisites were fulfilled.

The establishment of the High Court of Judicature at Rangoon by Royal Charter in 1922 as the principal Court of Appeal has helped to assimilate the interpretations of the Burmese Customary Law which till then, were often at variance.

In Ma Yin Mya v. Tan Youk Pu (1), an important issue arose whether Burmese Buddhist Law regarding marriage should be applied to Chinese Buddhists and a Full Bench of the Rangoon High Court held that while the capacity of each of the parties to the marriage is governed by his or her law of domicile, the formal requisites of the marriage are to be determined as follows :

(1) Burmese Buddhist Law regarding marriage is prima facie applicable to Chinese Buddhists as lex loci contractus;

(k) 7. B.L.T. p.71.

(l) 5. Ran. p.406. F.B.

(2) to escape from the application of Burmese Buddhist Law regarding marriage, a Chinese Buddhist must prove that he is subject to a custom having the force of law in Burma, and that the custom is opposed to the provision of Burmese Buddhist Law applicable to that case; and

(3) in case the matter in issue is the marriage of a Buddhist Chinaman with a Burmese woman, he must show that the application of the customs having the force of law will not work injustice to the woman.

In Chan Pyu v. Saw Sin (m), Cunliffe, J., considered the effect of the decision aforesaid. He appears to have thought that "the case could have been decided on the analogy of the decisions of the English Courts preventing on equitable principles, in cases of the formal requisites of marriage, hardship or injustice being experienced by English women who have ignorantly married husbands who are foreigners in a legal sense (n)."

Although no attempt was ever made to impugn the conclusion arrived at in Ma Yin Mya's case that a Buddhist Chinaman cannot claim his marriage with a Buddhist woman to be governed by Chinese Customary Law, it is apparent that several learned Judges constituting the Full Bench which later decided Phan Tiyok v. Lim Kyin Kauk (o) could not subscribe to the

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(m) 6. Ran. p.623.

(n) U E Maung's B.B.L. p.4.

(o) Ante. 15.

the views therein expressed that Burmese Buddhist Law applies to all Buddhists of whatever nationality, in Burma. But the decisions in Phan Tiyok's and Chan Pyu's cases have since been over-ruled and if Ma Yin Mya's case has left any room for doubt as to the applicability of Burmese Buddhist Law prima facie to marriages between Chinese Buddhists and Burmese Buddhists, the Privy Council decision in Tan Ma Shwe Zin's case (p) has now settled the point forever.

Besides, the decision in Ma Yin Mya's case on point of marriage satisfies justice, equity and good conscience. Despite strong references made against its implications ~~on~~ in other matters by several Judges in subsequent cases, the justice of its actual decision on the question of marriage is made manifest in Ma Kyin Mya v. Maung Sit Han (q) by extending its application to marriage of a Burmese Buddhist woman with a Chinese Confucian, Spargo, J., remarking :

> "In cases of a marriage in Burma between a Chinese Confucian and a Burmese Buddhist woman, section 13 (1) (a) of the Burma Laws Act does not apply as both parties are not Buddhists, and section 2 of the Special Marriage Act also does not apply as one party is a Confucian and the other a Buddhist. Section 13 (3) of the Burma Laws Act therefore, becomes applicable as a matter of equity, justice and good conscience, and in a case of this nature,

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(p) Ante.p.16.

(q) R.L.R. (1937) p.103.

nature, it means not the application of English Law, but of Burmese Customary Law as the lex loci contractus."

Although it is true that Burmese Buddhist Law as the lex loci or lex fori governed the Buddhist and non-Buddhist inhabitants of all nationalities before the annexation, it was held in Sophia Blin v. Maria David (r) to be inapplicable to marriages between non-Burmans non-Buddhists celebrated in the days of Burmese monarchs.

Karen Animists have their own marriage customs, but those who profess the Buddhist religion come under Burmese Buddhist Law (s). Shan States are expressly excluded from the operation of section 13 of the Burma Laws Act, by sub-section 4 thereof, and under sub-section 2 of section 11 of the Act, the law to be administered there is the customary law of the state in so far as it is in accordance with justice, equity and good conscience, and the practices which are permitted thereby are in conformity with the spirit of the law in force in the rest of Burma. But Shan Buddhists have no separate personal laws apart from that of Burmese Buddhists (t). Nor have Arakanese Buddhists. Mon Buddhists of Pegu and Tenasserim Divisions are also subject to Burmese Buddhist Law. As a matter of fact,

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(r) 12. B.L.T. p.48.

(s) Maung Saw Tu v. Ma Sa Ma. 25. I.C. p.342.

(t) Ma Shwe Yin v. Maung Ba Tin. 2 B.L.J. p.114.

fact, the Wagaru which is one of the oldest Dhammathats that embodied Burmese Customary Law was written in the Mon language. The writer proposes to deal with the Dhammathats in a separate Chapter.

Section 13(1) of the Burma Laws Act, 1898, thus, clearly lays down that all matters relating to marriage shall be decided in accordance with Buddhist Law where the parties to the suit or proceeding are Buddhists. It may, perhaps, be pertinent to observe here that section 2(a) of the Majority Act (IX of 1875) also enacts that nothing contained in the Act shall affect the capacity of any person to act in matters of marriage, divorce, etc. Accordingly, the Courts are often called upon to decide whether a certain matter constitutes an act of marriage with a view to find out whether the parties thereto are exempt from the operation of the Majority Act, 1875.

A contract to marry in futuro is not an act in the matter of marriage, and a suit for damages for breach thereof is therefore, not governed by Burmese Buddhist Law, but by ordinary law of contract; and consequently, the age of the contracting parties has to be determined in accordance with the provisions of the Majority Act, 1875, while a contract to marry in praesenti comes within the purview of Burmese Buddhist Law(u). It is obvious that divorce is a matter relating to marriage. Seduction with or without promise to marry is not a marriage affair, and no suit for damages arising therefrom can be entertained under Burmese Buddhist

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(u) Maung Tun Aung v. Ma E Kyi . 14. Ran. p.215. F.B.

Buddhist Law(v).

Natural guardianship of the parents over their minor children is an incident of marriage, but in C.T.V.E.Vyravan Chettyar v. Ma Saw Mwe (w), it was held that the personal law of Burmese Buddhists does not recognize de facto guardianship of minor's properties, that section 13(1) of the Burma Laws Act,1898 does not apply to guardianship of such properties, and that such matter is definitely governed by a separate statute, i.e., the Guardians and Wards Act (VIII of 1890). The writer intends to deal with these subjects, each in its own place.

(v) U E Maung's B.B.L. p. 12.

(w) 12. Ran. p. 47.

CHAPTER V.

SOURCES OF BURMESE CUSTOMARY LAW.

We have mentioned in a recent chapter that clear proof of custom or usage will always outweigh the written texts of law, as laid down in Collector of Madura v. Mootoo Ramlinga (a); consequently, customs and usages must be regarded as the fountains of modern customary Law.

Another source of modern customary law ~~are~~ is the Dhammathats which embodied the rules of law by which the inhabitants of the land were governed in the days of Burmese sovereigns. It is now over 2500 years since Manu - the supposed law-giver - lived, and the laws in his books are, perhaps, more ancient than they are said to be. They are but records of the customs that had been evolved in generations that preceded. They had been developed, recast and rewritten now and again to suit the changing conditions of the lives of the people.

That the customs embodied in the Dhammathats were commonly observed among the people at the time of their compilation and perhaps at an earlier age, need not be doubted. They are evidence of their wants and wishes; they are natural to the simple lives they led. They fitted in with their village system, with their religion, and with the social life in those days. The laws are old and yet not

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(a) 12. Moore's I.A. p.397.

not old, for they are living forces, and the people were content// to be governed by them. There was hardly any distinction between the Criminal and the Civil law, and the difference between offences against a private individual such as assault and those against public morality such as theft, appears not to have been recognized. Nor was the necessity of the machinery of Judges and Magistrates clearly contemplated, in that resort to the authorities was considered unnecessary if the accused person could settle his grievance with his adversary without the intervention of a third party. It was much the same with the administration of Civil justice in those days. Sir John Jardine in his Notes on Buddhist Law (b) said: "The Burmese say there are six classes of Judges. First, there are the parties themselves who may agree together to some decision of their cause; secondly, they may appoint one or more arbitrators of their own; thirdly, there is the unpaid but officially appointed and recognized arbitrator whose Court is termed Khong. Above this is the Court of the district officer; then the chief Civil Court at the Capital, and finally the King, whose authority is mostly exercised through the Hloot". In deciding Civil suits, the principal aim of the Judge was, if possible, to satisfy both parties and the result in almost all cases was a compromise arrived

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(b) Notes II para.27. p.15.

arrived at generally on the basis of the rules contained in the Dhammathat which was most popular at the time. Unless it can be satisfactorily established that the rules of law contained in the recent and popular Dhammathats have been modified, altered or abrogated by prevailing customs having the force of law, the British Courts constituted under the Burma Courts Act, 1922 still have to apply them to the Burmese in matters relating to marriage or caste, succession, inheritance, religious usage or institution as required by section 13 of the Burma Laws Act, 1898. In the circumstances, the Dhammathats which will be treated separately in the succeeding Chapter, constitute an important source of modern Burmese Customary Law.

The Pitakas and commentaries thereon are useful sources of Burmese Buddhist Law. There are three Pitakas, namely (i) Suttam Pitaka, (ii) Vinaya Pitaka, and (iii) Abhidhamma Pitaka. They are the compilations of the teachings of the Buddha. The first and the third Pitaka concern the laity as well as the Monastic Order, whereas, the second is exclusively meant for the latter. The Suttam Pitaka provides samples of ancient Buddhist customs previling in Buddhist India. The Vinaya Pitaka consists of five texts, namely (i) Parajikam, (ii) Pacittiya, (iii) Mahavagga, (iv) Culavagga, and (v) Parivara. There are three principal commentaries on those Vinaya texts and they are known as Atthakathas, Tikas and Gandhandharas. It is settled law that all matters relating to religious usage or institutions shall be decided in

in accordance with the Vinaya texts and commentaries thereon which constitute "Buddhist Law" within the ambit of sub-section (1) of section 13 of the Burma Law Act, 1898. Where they are silent, the provisions of the Dhammathats, in so far as they are not inconsistent with them may be referred to (c).

The decisions of the Hloot or the Burmese Privy Council some of which have been compiled and published as "Hluttaw Records", afford but an insignificant guide for the interpretation of the principles of Burmese Buddhist Law. They are not good enough to serve as authorities or precedents which modern Courts could adopt safely. The points in issue are often not clearly set out and the reasonings are mostly obscure, and rapid changes in customary law since those decisions were made, render references to them not only undesirable but also inexpedient.

But authorized reports of the judicial decisions of the British Courts since the annexation constitute another important source of modern customary law. They include the decisions of the Judicial Committee of the Privy Council as well as the High Court of Judicature at Rangoon and the Chief Court of Lower Burma. It is also certain that some of the decisions of the Recorder's Court of Rangoon, the Courts of the Judicial Commissioners of both Upper and Lower Burma and also the Special Court, form a valuable guide to the correct decision of disputes under customary law by our Courts. The High Court in deciding particular cases, enunciates the

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(c) Shwe Ton v. Tun Lin. 9. L.B.R. p.220. F.B.
A.R.L.P.Firm v. U Po Kyaing and another. R.L.R.(1939)p.311.

the principles of law involved, and these views of law in so far as they have not become obsolete by recent changes of customs on which they are based, are acted upon in similar cases arising subsequently on the principles of stare decisis (abide by decided cases) and communis error facit jus (common error makes a right). In all civilized jurisprudence, the binding force of precedents is fully acknowledged, but where justice is administered mostly by European Judges with no first-hand knowledge of the uncodified customary law, this doctrine is likely to perpetuate errors, especially when they have access only to the English translations of the Dhammathats which are generally inaccurate if not misleading. A few instances of what the writer respectfully submits as errors arising from reference to inaccurate translations of the Dhammathats are being pointed out in the succeeding Chapters(d).

One of the outstanding effects of judicial decisions on Burmese Buddhist Law by English Judges is the importation of English ideas of equity into the system. This is one of the channels through which English law has made ~~it~~ its influence felt - an influence not directed by any deliberate purpose, but nonetheless profound and far-reaching in its effects. For examples, the rule that a "Kittima" adopted child does not need to reside with the adoptive parents is, as observed by U May Oung, almost entirely the result of judicial legislation in the British Courts (e), the Dhammathats

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(d) See Chapters XII and XIII. infra.
(e) May Oung's L.C. p.158.

Dhammathats insisting on joint-residence of such child and the adoptive parents (f); likewise, the British Courts have from very early days, recognized the right of either spouse to sue for restitution of conjugal rights where the other has failed in his or her marital duty, although such a suit is not expressly recognized by the Dhammathats (g). Thus, judicial decisions sometimes pave the way for the growth of new customs, and often settle existing customs by giving them recognition. In this sense, they may be treated as another important source of modern customary law.

Legal treatises, as distinct from modern text-books, may be a distant source of present day customary law, though they were not originally written with official sanction. It would not be unjust to treat some of the Dhammathats digested by the Kinwun Mingyi, under this head (h). Such books are no doubt useful for guidance of the Courts at a time when customary law is still in the melting pot, i.e., when it is still uncodified and it chiefly exists in the form of customs. If then a competent jurist records the various rules observed by the community, and if his version is accurately and skilfully compiled, it first receives recognition of the community, and eventually, of a Court of Justice. But a treatise by a modern

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(f) K.M.D.(I)Sec.195.

(g) Nga Nwe v. Mi Su Ma. S.J. p.391.

(h) See Chapter VI infra. p.39

modern scholar merely records the opinions of the author; it does not make law, though it may help the reader to find out what it is; and if his opinions are convincing, they may, perhaps, afford valuable materials for argument. Beyond that, such a treatise is hardly of any value.

CHAPTER VI.

THE DHAMMATHATS.

It has been said in the preceding Chapter that Burmese Buddhist Law is contained in the Dhammathats. What are the Dhammathats ? The word "Dhammathat" is a corruption of the Sanskrit word "Dharmashastra" meaning a law book. By law, we mean not the sacred law preached by the Buddha, but the customary law of the Burmese.

According to the Kinwun Mingyi, the compiler of the Digest of Burmese Buddhist Law, a Dhammathat is "a collection of rules which are in accordance with custom and usage, and which are referred to in the settlement of disputes relating to person and property (a)".

In Kirkwood v. Maung Sin (b) their Lordships of the Privy Council said that "Burmese Buddhist Law is contained in a series of books entitled 'dhammathats' which have been composed from time to time by the expounders of that law ever since the thirteenth century if not from before". This remark does not however, justify the view that customs and usages contained in those Dhammathats are still current. Burmese Customary Law is not a codified law and the Dhammathats contained not only the ancient customary law of the people but also that which was prevalent at the time of their compilation, and which at times conflicts with the former. It has been said that changes in customary law are wrought by evolution of time and many of the

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(a) K.M.D.(I). p.2. (b) 2. Ran. p.693 @ 776.

the customs embodied in the Dhammathats have apparently become obsolete with the progress of civilisation of the people. Accordingly, Major Sparks was perfectly right in saying about the Manugye - one of the Dhammathats - that "it is in a great measure obsolete, and is no more applicable to the decision of suits of the present day in the Courts of Pegu than are the laws of Alfred in the modern Courts of England (c)." It will be remembered that the Manugye Dhammathat referred to by him, in the view of Dr. Forchhammer, is comparatively a modern compilation as it is supposed to have been written in 1756 A.D. (d).

In Thein Pe v. U Pet (e), Fox, J., observed : "The general rules of Buddhist Law applicable to Burmese Buddhists are, I understand, those laid down in the Dhammathats. By these laws, Burmese Buddhists profess to be and desire to be governed in matters of marriage, inheritance and succession. I cannot recall to my mind any instance of any Burmese Buddhist claiming any right in such matters based on any custom opposed to the laws contained in the Dhammathats. The latter are regarded, as far as I can judge, as the fountains of the law governing them". It is submitted that this view which seems to have influenced the Bench that decided Ma Nyun v. Maung San Thein (f), is incorrect. In the latter case, the Bench proceeded to decide it on the premise that all the rules as laid down in the Dhammathats and

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(c) Spark's Code, Sec.2. (e) 3. L.B.R. p.175 @ 179.

(d) Jardine's Prize Essay. p.108. (f) 5. Ran. p.537. F.B.

and particularly in the Manugye, prima facie are the rules of general law which bind Burmese Buddhists in matters of marriage, succession and inheritance. But the better and more popular view appears to have been taken by Irwin, J., in Thein Pe's case where he said: "The law to which they (Burmese Buddhists) are subject was not, in my opinion, the law of the Dhammathats, but the customary law, for the ascertainment of which the Dhammathats are a very important guide, but not the only guide (g)." Thus, in Ma Hnin Zan v. Ma Myaing (h) it was most rightly observed that "the Court is not only at liberty, but is bound to decide the case in accordance with the Burmese Customary Law as it obtains today, rather than to perpetuate the outworn shibboleths of bygone ages, notwithstanding that some sanction for their continuance may be found in extracts from the Manugye Dhammathat". It may now be taken as settled that the duty of the Court is not merely to administer law as contained in the Dhammathats, but to find out what the existing law is and to enforce the same, in keeping with the "fundamental principle of British imperial policy that so far as may be consistent with the maintenance of good government and ordered progress, the particular habits and customs of the various communities under British rule should be recognized and respected (i)".

(g) 3. L.B.R. p.175 @ 187.

(h) 13. Ran. p.487 @ 496.

(i) Tan Ma Shwe Zin v. Tan Ma Ngwe Zin. 10 Ran. p.97 @ 103.

The above view is in accordance with the following dictum of Page, C.J., in Maung Thein Maung v. Ma Kywe and others (j): "The truth is that Burmese Customary law of inheritance as set forth in the Dhammathats is not, strictly speaking, a system of law at all, but a congeries of decisions which are merely pronouncements ad hoc upon particular cases as they have arisen, and which for the most part do not purport to be determined pursuant to any general or guiding principle. Of course, the Dhammathats are not the sole repository of Burmese customary law, and I agree with U May Oung that the present customs are a safer guide than the little known law of the Dhammathats."

Again, a similar view was taken by Dunkley, J., in Maung Thein and another v. Maung Nyo Sein and another (k) where he observed: "The task of the courts of British Burma has been, and still is, to deduce from the ad hoc decisions compiled in the Dhammathats, general principles of the common law of Burma which are in accordance with the habits and customs of the Burman of today."

The writer does not propose to deal with the origin of the Dhammathats which should form the subject of a separate thesis. It is also beyond the scope of this study to deal with it at a greater length. Suffice it to say that they had their origin in Hindu Law. The Dhammathats generally divided the law under eighteen heads, more or less the same as in the Hindu Manu (1).

(j) 13. Ran. p.412 @ 420.

(k) R.L.R.(1939) p.160 @ 167.

(l) Jardine's Prize Essay. p.45.

Out of the thirty-six Dhammathats contained in the Kinwun Mingyi's Digest, five spoke of different kinds of Burmese Buddhist marriages which in names are very similar to the eight forms of Hindu marriages (m). However, the foreign law was not taken over bodily, but evenly adapted to suit Burmese requirements. "The Burmese Dhammathats disclose their Indian origin almost at every turn and it would be futile to enter upon an investigation as to the date of introduction of Hindu Law into Burma (n)."

In Mi Lan v. Maung Shwe Daing (o) the learned Judicial Commissioner of Upper Burma remarked that "the Hindu Law has been borrowed though we do not know exactly when and from what source, and has been modified by the requirements of a non-Indian race which has adopted the religion of Buddha. In applying Hindu Law, essential differences of conditions, racial and religious, must have been found in two important particulars, the position of the wife and the constitution of the joint property".

To readers who are anxious to know more about the sources and development of Burmese Buddhist Law, the writer cannot do better than to refer them to the Notes on Buddhist Law by Sir John Jardine and the Jardine Prize Essay by Dr. Forchhammer. The latter was the pioneer in the study of the development of

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(m) U E Maung's B.B.L. p.19.

(n) Chan Toon's P.B.L. p.9.

(o) Ibid. foot-note at page 11.

of Burmese Buddhist Law and he still stands alone as the only scholar who has attempted a survey of the legal literature of Burma along the lines of modern scientific criticism. Although it is difficult to accept all his conclusions and views as correct in that in some cases they do not agree with the accounts given by two eminent Burmese scholars - Mahathirizeyathu and the Kinwun Mingyi, compilers of the Pitakat Thaming and the Digest of the Burmese Buddhist Law, respectively - there can be little doubt that he has paved a way for the young and ambitious of the generations that follow to make further researches into this vast and important subject yet so little known, due to the paucity of official or reliable records.

Of the thirty-six Dhammathats contained in the Kinwun Mingyi's Digest of Burmese Buddhist Law and believed by him to be still extant, the Courts attach paramount importance to the Manugye which to this day "is the most widely read and studied law book in Burma, and after the British had taken possession of this province, the natives pointed to this Dhammathat as containing the body of laws by which they had been governed (p)". In Ma Hnin Bwin v. U Shwe Gon (q) their Lordships of the Privy Council perpetuated its authority by the dictum that where it is not ambiguous, the Courts need not refer to any other

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(p) Jardine Prize Essay. p.104.

(q) 8. L.B.R. p.1. P.C.

other Dhammathats for guidance.

A list of the thirty-six Dhammathats in chronological order as drawn up by the Kinwun Mingyi, is reproduced for reference in Appendix A.

Nothing but extreme modesty must have prevented the Kinwun Mingyi from including the Attasankhepa - the Dhammathat which he himself had written- in his comprehensive Digest published by the sanction and under the authority of the Government of Burma after the annexation. "This book is a compilation or digest of the leading texts on Buddhist Law, and it is believed to have been approved of and commonly accepted as authoritative during the reigns of the last two Burman sovereigns (r)." It is entirely omitted from the Digest except for an incidental reference in Volume II at page 183.

To write more of the Dhammathats would mean a departure from the object of the work in hand. But as a warning against undue reliance being promiscuously placed on the texts contained in the various Dhammathats, the writer desires to quote with approval, the dictum of Jardine, J., in Ma Le v. Ma Pauk Pin (s): "It is the function of the Courts to know the present customs of the people so as to avoid the administration of long forgotten law; I must observe that the Dhammathats, especially the more recent ones, are almost our only guides, and that here

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(r) Chan Toon's P.B.L. p.13.

(s) S.J. p.225 @ 232.

here as in India, the customs are changing. The knowledge of the present ought to go with the learning of the books".

The readers should always bear in mind that reference to the Dhammathats is permissible only in matters relating to succession, inheritance, marriage or caste, and religious usage or institution, and even then as observed obiter by Rigg, J., in Maung Hme v. Ma Sein (t), only in so far as the rules contained therein have not been "clearly modified by custom, or are repugnant to equity, good conscience or justice".

It should also be borne in mind that all the Dhammathats are not of the nature of statute law; only a few were compiled under the orders of the reigning sovereigns of the day, or published with royal authority for general observance. According to the Kinwun Mingyi, even the Manugye appears not to have been compiled by royal command. In this comprehensive list of the Dhammathats (u) he merely said: "Neither the name of the author nor the year of the completion of this Dhammathat is mentioned in the work itself. According to the History of the Pitakat, it was written by Bhummajeya Mahathiriuttamajeya Thingyan, Wun in charge of the moat of the city of Shwebo, during the reign of Alompra (Alaungpaya), who ascended the throne in 1114 B.E." So far, no definite evidence is available to prove conclusively that Alompra commanded its compilation; nor is there any historical record to show that it was published for general observance by royal authority.

(t) 9. L.B.R. p.191.

(u) See Appendix A. infra.

On careful scrutiny of authorship of the Dhammathats considered by the Kinwun Mingyi as still extant, the authors of some were unknown, many were written by insignificant people, and five or more by village monks. Only one appears to have been written by a Judge. Some of the authors were more of scholars or poets than jurists as they versified the law books. And for all these works except in a few cases, there was no suggestion of any royal authority. They probably stated what the law was at the time they were compiled or what it should be in the view of the authors. Thus, it is difficult to treat them all on the same level as statutes and they need not necessarily be considered as authoritative except in so far as they gained general approval. In the Burmese Courts, the Judges consulted them or some of them, but did not regard their dicta as binding. It is only in the British Courts that an attempt was made to balance one against the other and to accept the result as a rule of decision.

CHAPTER VII.

THE MATRIMONIAL COURTS.

Under the Burma Courts Act, 1922 as amended from time to time (a) the following Courts are constituted in British Burma with jurisdiction over matrimonial suits, viz:

(i) Township Courts,

(ii) Subdivisional Courts,

(iii) Assistant District Courts, and

(iv) District Courts.

At almost every township headquarters, there is a Township Court generally presided over by a Subordinate Judge. The limit of pecuniary jurisdiction of this Court ordinarily extends to Rs.1000; it decides disputes including matrimonial matters when the defendants reside or the causes of action rise within its local limits.

The Subdivisional Court exercises a similar jurisdiction within a Subdivision. The Judge is generally a member of the Burma Judicial Service, often with some experience in both law and procedure. Ordinarily, it has a pecuniary jurisdiction up to Rs.5000.

The Assistant District Court is a recent creation. It entertains suits of the value ordinarily not exceeding Rs.15,000. and it exercises jurisdiction within the district. The Judge is often an experienced officer; he is appellate authority in respect of the decisions of the Township Courts within the

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(a) Act III of 1926, Act IV of 1927, Act IV of 1932.

the district when the sum involved does not exceed Rs.500.

There is generally a District Court for each important district. Where the Civil work of a district is not sufficient to justify the establishment of a separate District Court therefor, two such districts may be combined and placed under one District Judge. The Judge is almost invariably a man of vast judicial experience; his powers both original and appellate are unlimited within his local jurisdiction. He hears appeals from the decisions of all other inferior Courts except that of the Assistant District Court.

The High Court established by the Royal Charter in 1922 sits at Rangoon. It exercises original jurisdiction similar to that of a District Court for the City of Rangoon. It is also the highest tribunal of justice within the country and it exercises both revisional and appellate powers in respect of all decisions of inferior Courts constituted under the Burma Courts Act,1922. Under certain conditions, appeals from the decisions of this Court lie to the Judicial Committee of the Privy Council which advise His Majesty what their final results should be.

It should be noted that all these Courts have jurisdiction over matrimonial suits. Under section 15 of the Code of Civil Procedure (Act V of 1908) a civil suit has to be instituted in the lowest grade Court competent to try it. Nevertheless, this section does not oust the jurisdiction of a superior Court in suits within the jurisdiction of an inferior Court. Consequently, should a superior Court try a suit which is within the competence

competence of an inferior Court, the error can be cured under section 99 of the Code and will not effect the validity of the proceedings. The valuation of suits for the purposes of jurisdiction and Court Fees is governed by the Suits Valuation Act (VII of 1887) and the Court Fees Act (VII of 1870) respectively. However, a matrimonial suit such as for the restitution of conjugal rights, declaration of the status of husband and wife, or for divorce is, in practice, so valued as to confer jurisdiction on a Township Court unless pecuniary relief is also claimed therein to raise its value to over Rs.1000, thus rendering its institution in a Court of the higher grade imperative. It should be remembered that objections to valuation of suits must be taken at the earliest opportunity and where such an objection is raised for the first time only in appeal, the decision of the Court of first instance will not be set aside on that score alone, unless the undervaluation has prejudicially affected the disposal of the suit on its merits.

Besides the Courts mentioned above, we have the Courts of the Village Committees constituted under section 6 of the Burma Village Act, 1907. These petty tribunals, some if not all, appear to have been invested with powers of a Civil Court with jurisdiction over matrimonial disputes, by special or general notifications issued by the Commissioners of the Divisions. Foot-note to section 6(1) of the Burma Village Act, 1907 says that the practice in investing powers of a Civil Court on a Village Committee is to issue a special notification in each case by the Commissioner of the Division within whose jurisdiction the

the village is situated. To make sure whether a matrimonial suit is generally included in the classes of cases specified in such notification, as triable by the Village Committee, the writer instituted an inquiry from the Commissioner of Pegu Division - one of the most important Divisions in Burma - on the subject, and the reply he received was as follows:

> "Matrimonial suits are included in the jurisdiction which Commissioners habitually confer on village committees, but I never heard of any definition of matrimonial suits, and I do not remember hearing of any case in which this jurisdiction was exercised, although as you probably remember, the revision authority used to be the Township Officer (it is now the Township Judge.)".

It is, therefore, apparent that the Village Committees in Burma do have jurisdiction over matrimonial suits, although it appears that the parties generally prefer to go to a Civil Court whenever they have the means to bear the costs of the trial.

The village headman is ex officio chairman of the tribunal (b) and he and two other members of the Village Committee constitute a quorum (c). Under sub-section 1 of section 6 of the Act, "the Court of a Village Committee" has jurisdiction to try suits between persons of whom both or all, as the case may be, reside within that village tract, but sub-section 3 provides that notwithstanding any provision of the Code of Civil Procedure, a person is not bound to institute a suit in

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(b) Executive Orders.para.12.B.V.M.p.77.
(c) Rule 19. B.V.M.p.29.

in the "Court of a Village Committee". Sub-section 4 lays down the fee payable by the plaintiff to the headman on the institution of a "matrimonial suit". The Suits Valuation Act, 1887 and the Court Fees Act, 1870 do not apply to the suits instituted in such Courts.

The term "matrimonial suits" in nowhere defined in the Burma Village Act, 1907, but there can be little doubt that it covers the suits for restitution of conjugal rights and divorce, and probably, the declaratory suits to establish the status of husband and wife between the parties. It would, therefore, appear that in the absence of any statutory limitations, the Court of a Village Committee can entertain suits relating to such matters, and though the plaintiff has the choice of forum (d), it seems the defendant has no alternative but to submit to its jurisdiction once the suit is filed there. No doubt, the Court of a Village Committee may stay the proceedings and recommend the plaintiff to file a suit in the Civil Court, if in its opinion, a difficult question of law is involved (e).

It would, therefore, appear that the legislature constitutes these Village tribunals to ensure convenience to the parties and for summary and speedy disposal of petty matrimonial disputes, and doubtless the summary procedure was found both satisfactory and expedient in ancient days when a village was but a large family unit, composed of persons inter-related,

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(d) Sub-section 3 of sec.6 B.V.Act, 1907.

(e) Rule 13. p.31. B.V.M.

inter-related, and the headman and the elders knew the merits of the case before they were called upon by one of the interested parties to decide. The law they applied being the customary law of the Dhammathats with which they were generally familiar, it was probable that they seldom encountered any genuine difficulties in law or in fact, while giving their decisions. The village life was simple, and the inexpensive and speedy disposal of the disputes was, to the simple folks, unquestionably a great advantage. But conditions have changed. The village community is no longer what is used to be; it has become more or less a cosmopolitan crowd; easy communications between different places encourage people to change their residences often; marriages with foreigners have become more frequent; customary laws undergo rapid changes to keep abreast of the time, and the headman and the village elders cease to possess first-hand knowledge of the matters in dispute which is so essential for giving correct decisions by summary procedure. To make matters worse, the Civil Courts have, in recent years, produced volumes of conflicting case-law on the subject. The headman and the elders are not at all acquainted with the present-day law which the Civil Courts have shaped in the light of changing customs prevailing in large towns and which often are quite different from those still current in the villages where also the change takes place but slowly. Hence, a wrong decision resulting from inexperience and ignorance of uptodate law on the part of those on whom the legislature has with the best of intentions cast the duty of deciding matrimonial disputes, is bound to prejudice

prejudice the interests not only of the parties immediately concerned, but also of their off-spring and relatives who may have the right to succeed or inherit them at some future time. The disastrous effect thus produced is aggravated by the wrong decision becoming final subject to revision by the Judge of a Township Court - the lowest Court constituted under the Burma Courts Act, 1922 - by virtue of sub-section 2 of section 6 of the Burma Village Act, 1907 (f). Considering the fact that the presiding Judge of a Township Court is generally the most inexperienced judicial officer, his judgment in revision can hardly be expected to be sounder than the decision which he is asked to alter by an aggrieved party. But the law says that his decision, whether right or wrong, is final and parties are bound by it.

Whether the decision of the Court of a Village Committee in a matrimonial suit would operate as res judicata in a subsequent suit before another Court as between the same parties and on the same issue under section 11 of the Code of Civil Procedure, has never been raised for settlement before the Rangoon High Court, though in view of the wordings of section 6 of the Burma Village Act, 1907 and all its implications, it is not unlikely that the plea of res judicata would be sustained. But how the Court in which the issue is subsequently raised will be guided, the writer cannot understand inasmuch as the proceedings before the Court of a Village Committee are destroyed

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(f) As amended by Burma Act II. 1935.

destroyed at the end of the year following that to which they belong(g) and although the parties and witnesses are put on oath in the course of the proceedings, only the substance of their evidence and only a brief statement of the ground for the decision need to be recorded(h).

It is high time for the Government to look into the points raised in this chapter with a view to amending the existing law. In the opinion of the writer, the matrimonial jurisdiction of the Court of a Village Committee which sub-section 4 of section 6 of the Burma Village Act,1907, by implication seems to confer, should be withdrawn immediately. There is ofcourse, no objection to the headman and the elders being called to attest any transactions whether it be marriage,divorce or otherwise : there is, as a matter of fact, provision in the Code of Civil Procedure,1908 to facilitate settlement of all disputes by arbitrators appointed by the parties, with or without the intervention of the Courts. Where the decision is of the arbitrators whom the parties themselves have nominated of their own free will and accord , the State need not insist upon its being in accordance with justice and equity; it is sufficient if the arbitrators have made the award impartially and in good faith to the best of their ability. But it should be obvious to the Government that the Court of a Village Committee is under modern conditions, totally unfit to adjudicate summarily upon disputes relating to matrimony among the Buddhists, a subject as delicate and important as it is perplexing.

(g) Rule 12. p.29. B.V.M.

(h) Rule 22. p.30. Ibid.

BURMESE BUDDHIST MARRIAGE.

Bentham in his Theory of Legislation (a) said: "Under whatever point of view the institution of marriage is considered, nothing can be more striking than the utility of that noble contract, the tie of society, and the basis of civilization. Marriage considered as a contract, has drawn women from the severest and most humiliating servitude; it has distributed the mass of the community into distinct families; it has created a domestic magistracy; it has formed citizens; it has extended the views of men to the future through affection for the rising generation; it has multiplied social sympathies. To perceive all its benefits, it is only necessary to imagine for a moment what men would be without that institution." This observation of the eminent jurist is no less true of the Buddhist marriages in Burma.

Nature of Buddhist Marriage. For better appreciation of the nature of a Burmese marriage, it is desirable to consider it in its earliest aspect, and the following legendary account of the beginning of the human race serves to describe how the first men and women came together (b); "Then the males looked on the females, the females on the males, and thus sexual desires inflamed all, and sexual intercourse took place universally. Wise men reviled and opposed these

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(a) Part III. Chapter V. p.215 @ 216.

(b) Manugye (Vol.I) sec.6.

these degrading practices. To be free from this, and to conceal their bad deeds, they built houses, lived within enclosures, and following each other's example, secured a supply of food."

Commenting upon this passage, U May Oung in his Leading Cases on Buddhist Law (c) observed: " The probable origin of the Burmese expression ein-taung or ein-daung (literally to set up a house) is here revealed, and in the olden days, a marriage was actually a setting up of a house. The people lived in collections of small dwelling places, and when a new couple arose, a new place of residence where they would ' live and eat together ' was put up for their use, either immediately or as soon as practicable afterwards. Thus, the fact of their union could not but become known to all in the village. Those in authority would note a new unit for taxation, and the companions of the bride and bridegroom would realise a defection from their company. The house and its appurtenances, nearly all presents from parents, relatives and friends, would constitute the nucleus of the new pair's joint property, and every inducement would exist for a satisfactory continuance of the household."

Thus, marriage at its inception was considered somewhat disgraceful being purely sensual in nature, and this perhaps, explains the prevailing custom among the Burmese to throw stones at the house of the newly married couple on the night of the marriage.

(c) Part I. p. 3.

Religion and Marriage. Marriage among the Buddhists is purely a civil and consensual contract. Although the Buddha in his discourse to the laity laid down certain rules of conduct to be observed by married persons, parents and children, and certain ceremonies if any performed at the marriage, assume a religious form as will be seen in the succeeding chapter, yet marriage among the Buddhists is a secular affair over which the Buddhist Church does not even pretend to have any control whatsoever. No marriage is ever celebrated in a religious edifice, and the Buddhist priest takes no part in its performance. It is very remarkable that marriage in Hindu law is a sacrament, whereas the Dhammathats which derived their origin from it should treat it as purely civil.

But there was a time when the priests interfered in the civil affairs of marriage; it is apparent from Burmese history that those priests were heretics who thrived in Upper Burma before King Anawratha introduced Buddhism in its purest form into his kingdom at Pagan, about the eleventh century (cir.1010 A.D.). The Glass Palace Chronicle of the Kings of Burma(e) explains the interference as follows: " In the reign of Anawrathaminsaw, the kingdom was known as Pugarama. Now the kings in that country, for many generations, had been confirmed in

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(e) Part IV. p. 71. Translation by Tin & Luce.

in false opinions following the doctrines of the thirty Ari lords and their sixty thousand disciples who practised piety in Thamahti. It was the fashion of the Ari monks to reject the law preached by the Lord, and to form each severally their own opinions ..... Moreover, Kings and ministers, great and small, rich men and common people, whenever they celebrated the marriage of their children,were constrained to send them to these teachers at nightfall, sending as it was called, the flower of their virginity. Nor could they be married till they are set free early in the morning. If they were married without sending to the teacher the flower of their virginity, it is said that they were heavily punished by the King for breaking the custom ..... But Anawrahtaminsaw was a King of ripe perfections. He was converted by Shin Arahan and he rejected the doctrine of the Ari heretics."

It is clear that such interference by the heretics was checked as early as the beginning of the eleventh century, and since then, no Buddhist clergy, who are enjoined by the Buddha to practise celibacy, have taken any part, either directly or otherwise, in marriage functions.

Courtship. There exists considerable freedom among the Burmese in marriage matters which is in strong contrast with the conditions prevalent among the caste-ridden peoples of India. Broadly speaking, there is free choice of spouse among young Burmese. This freedom of the girls to dispose of their hearts according to their own wishes shows the comparative independence of the Burmese women. As among other nations,

nations, they generally find their partners in life by courtship which is still a popular institution in some villages of Upper Burma regarding which Fielding Hall said(e): "There is a delightful custom all through Burma, an institution in fact called 'courting time.' It is from nine till ten o'clock, more especially on moon light nights, those wonderful tropic nights when the whole world lies in a silver dream, when the little wandering airs that touch your cheek like a caress, are heavy with the scent of flowers, and your heart comes into your throat for the very beauty of life. There is in front of every house, a veranda raised perhaps three feet from the ground and there the girl will sit in the shadow of the eaves, sometimes with a friend, but usually alone, and her suitors will come and stand by the veranda, and talk softly in little broken sentences, as lovers do. There may be many men come, one by one if they mean business, with a friend if it be merely a visit of courtesy. And the girl will receive them all, and will talk to them all; will laugh with a little humorous knowledge of each man's peculiarities; and she may give them cheroots, of her own making, and perhaps, for one, she will light the cheroot herself first, and thus kiss him by proxy."

How long does the courtship last ? Generally, it lasts two years or more. During this period, both the boy and the girl try to understand each other better. They make their own

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(e) The Soul of a People. pp.201-202.

own investigation without risking publicity, into parentage, character, occupation and conduct of their partners in view. In fact, investigation is hardly necessary inasmuch as they belong to the same if not a neighbouring village. And be it noted that the girl does not accept the proposal unless and until she is confident that the boy who proposes will make an ideal partner.

What next when the girl accepts the proposal ? If she is a minor, the consent of her parents or guardians is considered necessary before she is bound by her acceptance. But she almost invariably enlists their approval of the match whether or not she is a minor. Being a girl, she naturally feels shy to sound her parents directly. But the boy ingeniously relieves her from that predicament by adopting an ancient custom known hitherto as "pasoe-tan-tin". When he next visits the girl's house as usual, he brings a "pasoe" (a long piece of cloth worn by man to cover the lower part of his body) and leaves it with the girl, whose duty is to hang it on the "tan" (a clothe-line) in the front room of her house. When her parents wake up the following morn, they find the "pasoe" of a stranger hanging inside the house. They at once understand what it means. The mother now inquires of her daughter to whom that "pasoe" belongs, and once the question is put, she feels it much easier to start the ball rolling. The parents leave the "pasoe" where it is, while they inquire into the life of their would-be son-in-law, and when they themselves agree to the match, the "pasoe" is removed and kept. This is a token

token of their approval and the girl is now free to ask her lover to arrange a betrothal ceremony which will be described later.

From this custom which is still prevalent in some of the villages of Upper Burma, it is apparent that marriage is not rashly performed among the Burmese and that previous consent of the parties as well as of their parents or guardians is generally obtained. No doubt, marriages are quite often arranged by the parents, and girls are not very different here from what they are elsewhere; they are biddable and ready to take the advice of their parents and accept it as the best. Hence, if a boy comes wooing and can gain the mother's ear, he can usually win the girl's affection too; but there are more exceptions here than elsewhere. The girls have more freedom of choice; they fall in love of their own accord. Love is a serious affair and they often exercise their right of self-det determination. The parents seldom withhold their approval, and marriage is accomplished with the least interference.

Marriageable Age. Marriages among the Burmese are not contracted until the parties have attained the age of puberty. Under the penal law of the land, it is a criminal offence to have sexual intercourse even with one's own wife if she is under thirteen years of age (f).

Civil Condition. There is a small proportion of married persons in Burma as compared with India. In 1931, 476 males and 345

(f) Sec.375. Penal Code.

345 females were unmarried, 471 males and 498 females were married, and 54 males and 157 females were widowed in every thousand, among indigenous races in Burma. Among the Buddhists, the proportion of married and widowed people was much less. The Census Report for 1931 (g) explains this condition as follows: "Marriage is a religious sacrament amongst the Hindus, the neglect of which is followed by evil consequences. A Hindu must marry (?) and beget children to perform his funeral rites, lest his spirit wanders uneasily in the waste place of the earth. If a Hindu maiden is unmarried at puberty, she is a source of social obloquy to her family and of damnation to her ancestors. In the case of Mahomedans and Animists in India, though the religious sanction is wanting, the marriage state is equally common partly owing to Hindu example and partly to the traditions of life in primitive society where a wife is almost a necessity, both as a domestic drudge and as a help-mate in field of work."

The conditions are very different in Burma. There is a big difference in the proportions of married women in India and in Burma and it is still greater in relation to the proportion of widows. The large number of widows is partly due to the disparity between the ages of husbands and wives, partly to early marriages, and partly to the prejudices against the remarriage of widows. Among the Burmese, there is no restriction of widow-marriages.

(g) Reproduced in Part I, para.59 @ p.98 of the Burma Census Report, 1931.

According to the Census Report, 1931, no marriages of either sex under the age of 13½ (complete) was recorded among the Burmese, whereas, 17 males and 32 females per thousand were recorded to have married under 6 years of age among Hindus, as compared with 25 males and 74 females among Muslims. It further shows that among the Burmese, the numbers per thousand married between the ages of 14-16, 17-23 and 24-43 are 9, 267 and 773 for males, and 47, 471 and 754 for females, respectively. These figures indicate that the problem of infant or child-marriage does not exist among the Burmese. On the age group 14-16, only 5% of Burmese females and less than 1% of Burmese males were returned as married. In the age group 17-23, the proportion married among Burmese males was slightly more than one quarter, but for Burmese females, the proportion is nearly one half. It is therefore, obvious that the earliest age at which Burmese females marry in considerable numbers is 17 or 18, while Burmese males generally wait two or three years longer.

It may be mentioned that there are no external indications of a woman's civil condition, whether married, divorced or widowed. Her name does not undergo a change after the marriage, and she wears no wedding ring or other outward symbol, though there is a modern tendency as a result of western influence, to wear the wedding ring as a distinguishing badge.

Remarriage of Widows. As already stated, remarriage of widows is permissible among the Burmese. In India, the prohibition of remarriage of widows is regarded by Hindus as

as a badge of respectability, particularly among the higher castes. But the legislature has removed the disability by enacting the Hindu Widows Remarriage Act, 1856. Muslims also share this prejudice, although remarriage is permitted by their religion. This is,perhaps, largely responsible for the high proportion of widows for both Hindus and Muslims. There can be very little doubt that absence of child-marriages among the Burmese is mainly responsible for the low proportion of child-widows as prevalent among Hindus and Muslims.

Polygamy. Polygamy is under certain conditions, recognized by the Dhammathats, but its converse polyandry has never existed among the Burmese. If a woman,therefore, marries or undergoes a form of marriage while a valid marriage subsists between her and another man, she is liable to criminal prosecution under sections 494, and 495 of the Penal Code. Only one prosecution of this kind had come to the knowledge of the writer during his fourteen years' experience as a judicial officer in Burma.

The Courts, while giving the recognition accorded by the Dhammathats, do not favour polygamy to its fullest extent. In Ma Hlaing v. Ma Shwe Ma (h), Burges, J.C., observed that "the principle of Buddhist Law is that a man should have but one wife, but that in practice, relaxation of theory is allowed, and a state of concubinage or living with lesser wives is recognized, and provisions made for these lesser wives and

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(h) II.U.B.R. (1892-96). p.153.

and their offspring sharing in the father's estate." A similar conclusion was reached by McColl, J.C., In Mi Kin Gale v. Mi Kin Gyi (i) and that was soon followed by the Privy Council in Mi Me v. Mi Shwe Ma (j) in which it was held that a Burmese Buddhist can have two wives at the same time, and the claim of two women to inherit on equal footing with each other as wives in his estate was recognized. The same tribunal also gave recognition to polygamy in Ma Wundi v. Ma Kin (k). The classification of wives will be treated in a separate chapter. Suffice it for the present to say that Burmese Buddhist Law does not prevent a man from contracting marriage with another woman during the subsistence of a valid marriage.

Exogamy. It is the practice of marrying out of one's own tribe, and is unknown among the Burmese. Even among the hill tribes of Burma, inter-marriage between the neighbouring tribes is not true exogamy in that it is not tantamount to a prohibition of marriage within a tribe or group. It is more a diplomatic arrangement for strengthening the power of the chiefs and consolidating the power of the class. A custom for the purpose of ensuring the friendship of rival villages by inter-marriage can scarcely be termed exogamy in the prohibitive or restricted sense of the term. Moreover, such practice exists in a very slight degree.

(i) I.U.B.R. (1910-13). p.42.

(j) I.U.B.R. (1910-13). p.111. P.C.

(k) IV.L.B.R. p.175. P.C.

Endogamy. It is marriage within the tribe. It prohibits marriage except between persons of the same blood or stock* and is not prevalent among the Burmese.

The essentials of a valid Buddhist marriage and incidents thereof will be treated under appropriate heads in the succeeding chapters.

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* Endogamous marriages still occur in remote parts of Russia. " One of the most celebrated heroes of our popular ballads - Ilia Mourometz encounters one day a free-booter named Nightingale (Solovei Razboinik). "Why' , asks the hero, ' do all thy children look alike?" Nightingale gives the following answer : " Because when my son is grown up, I marry him to my daughter ; and when my daughter is old enough, I give her my son for a husband, and I do so in order that my race may not die out." - Modern Customs and Ancient Laws of Russia by Mazime Kovalevsky (1891) p.14.

FORMALITIES OF MARRIAGE.

The Dhammathats do not insist upon any formalities as a requisite of a valid Buddhist marriage, but it is wrong to suppose that they have not mentioned anything about them. For instance, section 34 of the Kinwun Mingyi's Digest (Volume II) mentions two forms of marriage, viz: (i) the Āvāha in which the bride is brought to the bridegroom, and (ii) the Vivaha in which the contrary is the case. This division points to some measures of formalities, and at the present day, such ceremonial practices as the entertaining of guests, the clasping of hands of the bride and bridegroom, and the announcement of gifts form part of a Buddhist marriage, whenever parties can afford them. Even among the working classes, similar ceremonials though on a small scale, are not wanting as evidence of marriage, and they have gained so much popularity among the people that a marriage alleged to have taken place between the parties who can afford and yet have not adopted them, is liable to be viewed nowadays with suspicion of its validity. It is true that Burmese Buddhists by nature, love formalities and they always have them whenever possible.

The performance of a marriage ceremony accompanied by consummation thereafter, is always regarded as strongest proof of a valid marriage *. The importance attached to a marriage ceremony becomes manifest when we consider the forms

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* Whether consummation of marriage is necessary for its validity, see Chapter XIV. infra.

forms of questions which one asks another to discover when he would marry. Such question as "When will you marry ?" is seldom put, whereas it is generally asked "ဘယ်တော့မင်္ဂလာဆောင်မလဲ" (be daw mingala soung ma le) - When will you celebrate marriage ? or "ဘယ်တော့လက်ထပ်မလဲ"(be daw let htat ma le) - When will you celebrate hand-clasping ceremony ? It will be interesting to notice hereunder how the Burmese terms "Mingala-soung" and "Let-htat" become synonyms of the marriage ceremony.

Traditional Custom. There exists a traditional belief, perhaps more ancient than their civilization, among the Burmese. It is that there are twelve kinds of ceremonies, which if undergone at different periods of a person's life, will help him or her in the acquisition of "Mingala" (a Pali word to denote the blessing that ends all evils and promotes the growth of worldly power and possessions). What are those ceremonies ? They are connected with (1) shaving of the infant's hair, (2) placing of the infant in the cradle and rocking thereof, (3) naming of the infant, (4) feeding of the infant for the first time, (5) showing of the sun and moon to the infant, (6) ear boring of the child, (7) entering into the Buddhist monkhood, (8) washing of the hair, (9) marriage, (10) paying homage to the Buddha, (11) paying homage to His Teachings, and (12) paying homage to the gods. It should be remembered that ceremonies 1 to 5 relate to infants of both sexes; 6 and 7 to children of both sexes; 9 to adults only; and the rest to all persons irrespective of sex and age. Ceremony 6 was originally applicable to both sexes, but is now

now confined to females, whereas 7 is now available to males only. But each of them is considered very auspicious and though ceremonies 4 and 5 have gradually dropped out of currency, others with the possible exception of 2 and 12 are still prevalent among the Burmese.

Marriage is thus, one of the twelve modes of acquiring "Mingala" (blessing) and as such is something auspicious according to the Burmese notions. The word "Soung" in Burmese means "to bear" and "Mingala-soung", therefore, connotes "an event that bears blessing". Hence, strictly speaking, the term may be used to denote any of the twelve auspicious ceremonies enumerated above, but it is indeed surprising that it is being used among the Burmese to exclusively mean a marriage ceremony.

The term "Let-htat" means the clasping of hands of the bridegroom and the bride which generally takes place at a marriage ceremony. It is, therefore, more expressive than the term "Mingala-soung" to denote a marriage ceremony.

Preliminary Steps. There are two preliminary steps leading to the performance of marriage. They are:

(1) Proposal of marriage, and

(2) Betrothal ceremony.

It is not suggested that marriage cannot be performed without taking these preliminary steps. They are voluntary steps that generally precede a marriage ceremony.

Proposal of Marriage. It has been said that the Burmese marriage is but a consensual contract; hence, offer and

and acceptance are prevalent here as in any other civil contracts. The parties must consent to it and where the girl is under twenty years of age, her parents or guardians are also required to give their consent. One of the parties has therefore, to make the proposal which if accepted by the other party, ripens into a marriage contract. Let us assume that X, son of XY desires to marry Y, daughter of YZ, and XY contemplates the marriage. XY first obtains X's consent to the proposed match. XY then makes the proposal either directly or through a go-between, to YZ. Y is generally unaware of the proposal at this stage. YZ first enquires into X's parentage, occupation, income, character, etc. This over, YZ consults Y and also an astrologer who compares the horoscopes of X and Y to find out whether their union will be lasting, happy and prosperous. If the astrologer's prediction is favourable and Y consents to the proposed alliance, YZ communicates acceptance of XY's offer to give X in marriage to Y. This contract is binding on both parties and except for good and sufficient reasons, such as fraud, misrepresentation or mistaken identity of the contracting parties it cannot be repudiated. If there is a breach of this contract, the party at fault is liable to a suit for damages. This is the first preliminary step taken before the marriage is performed.

Betrothal Ceremony. Then comes the next step - the betrothal ceremony. It is performed to obtain publicity so that witnesses may be available to prove the marriage contract if either party disputes it later. This ceremony is solemnly performed

performed and invariably at YZ's residence in the presence of local elders and a few relatives of X and Y. It must be assumed that both parties at this stage, have thoroughly known each other, following the investigation made during the first preliminary stage, and that they have formally agreed to the terms of marriage in relation to matters such as gifts, etc. Again the astrologer is consulted to fix an auspicious date to perform the betrothal and marriage ceremonies.

Both XY and YZ invite their friends and relatives to YZ's residence on the chosen date at the appointed hour to perform the betrothal ceremony. What takes place at this ceremony, of course, varies with the custom obtaining in that locality. In Lower Burma, such ceremony is very briefly performed. Both XY and YZ announce at the gathering that with the consent of all concerned, the marriage between X and Y will be celebrated on a certain date already chosen by the astrologer. They also inform the gathering what properties each of them has promised to X and Y as bridal presents on the occasion of their marriage. YZ entertains the guests who are present at the ceremony.

In Upper Burma, however, such ceremony is generally performed with traditional solemnity, inasmuch as it is here that the foundation stone for the edifice of matrimony is publicly laid. The proceedings at the ceremony will bear testimony to its significance. The writer has taken a leading part in several such ceremonies in both Upper and Lower Burma and is, therefore, able to give a vivid account thereof which

which readers may find interesting.

The scene is now in Upper Burma. XY and a few friends and relatives of X proceed to YZ's house on the appointed day at the fixed hour. XY carries with him some presents on that occasion, for Y. YZ receives XY and his party and entertains them. YZ's party also assembles there in time. The two parties sit facing each other, and the customary "interrogation" begins.

It will be noted that X and Y are not personally present at the betrothal ceremony, both in Upper and Lower Burma.They are represented by XY and YZ who should be their parents if they are still alive. If the parents are dead, the natural guardians of X and Y take their place. Where the father is still alive, his authority to give his child in marriage has never been doubted,* but he does not generally take part in the negotiations during the proposal stage. He often delegates his authority to the mother or some other female relative who acts as a go-between. It is only at the betrothal ceremony that he appears publicly to play his part in the marriage of his son or daughter. But even here, he may appoint some one to act on his behalf.

What is meant by customary interrogation ? YZ begins it with the general question put to XY what brings him to his house. XY replies that he has come to seek Y's hand for his son X. YZ then continues to put him the following questions:

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* See infra p. 117

1. Are you competent to answer my questions regarding X ?
2. Have you X's authority to answer them on his behalf ?
3. Does X agree to have Y as his lawful wife ?
4. Has X promised to marry anyone else besides Y ?
5. Has X any subsisting matrimonial tie with other woman ?
6. Is X a believer of the Buddhist faith ?
7. Does X respect the Three Jewels, viz: Lord Buddha, His Teachings and members of His Order ?
8. Does X respect his parents, elders and teachers ?
9. Is X free from incurable, loathsome or contageous disease ?
10. Does X lead a moral life ? Does he abstain from gambling, alcoholic drinking, etc ?
11. What separate properties if any, can X bring to the marriage?
12. What gifts if any, will XY give X on the occasion of marriage ?

Answers to questions 1, 2, 3, 6, 7, 8, 9 and 10 must be in the affirmative and 4 and 5 in the negative.

Where X is not a bachelor, the following supplementary questions are generally put after question 4:

(a) Has X any children by his first marriage ?

(b) If so, has X divided his estate between him and his children?

(c) With whom are the children staying if X remarries ?

Where X is a divorcee, the following additional questions are generally put to XY:

(d) Has X divorced his former wife ?

(e) Has X partitioned his estate with his divorced wife ?

It is expected that answers to these questions are in the affirmative.

XY in turn, puts similar questions mutatis mutandis to YZ and the betrothal ceremony is over.

From the nature of questions put to each other during the betrothal ceremony, one can judge what a solemn occasion it is. All the information which either party requires is publicly given, and it is on the strength of the representations made at this ceremony that the marriage contract is entered into. Any material misrepresentation by way of fraud, be it suppressio veri or suggestio falsi which has induced either party to consent to it, gives the opposite party a right to repudiate the marriage contract, and there are instances in the Dhammathats to show that the party who suffers by such fraud or misrepresentation has been granted ex parte divorce. Question 5 shows how distasteful it is for a man to have more than one wife although polygamy is permissible among the Burmese, and questions 6 to 12 indicate the great importance parents attach to the religious observance and character of their child's life-partner. So much about the betrothal ceremony.

It should be remembered that the interval between the betrothal ceremony and the performance of marriage is seldom of long duration unless the parties are considered still too young to assume matrimonial responsibilities. But be it noted that betrothal of young children has nearly died out now-a-days, and as a matter of fact it is almost unknown in this generation.

Forbidden Periods. Inasmuch as the Burmese are superstitious no marriage is performed during the Buddhist Lent beginning with the full-moon of the Burmese month of Wazo and ending with the full-moon of Thadingyut (three calendar months) as there is a superstitious belief that the parties to a marriage contracted during this period will be visited invariably with divine displeasure. Consequently, the writer is not aware of any instance of a Burmese Buddhist marriage (atleast among the respectable class) having been performed during this forbidden period, save one solitary event when a Burmese official gave his daughter in marriage to a young Civil Service probationer who was due to leave immediately for training abroad. Such an exception may perhaps be tolerated on ground of expediency, but it is submitted that it will in no way justify an inference that the prohibition aforesaid is no longer real among right-thinking populace. Besides the Buddhist Lent, the Burmese avoid performance of marriages during the months of Tabaung, Nadaw and Pyatho, for similar reasons. Thus, as a general rule, marriage is an accomplished fact within a short time after the betrothal ceremony, the interval lasting only a few days to make preparations for the ceremony, unless the forbidden periods render it impossible.

Marriage Ceremony. Now comes the actual marriage on the day appointed by the astrologer. The function takes place at YZ's residence and as such, is called Vivaha ceremony, which is available for common classes of Burmese people. In Lower Burma, however, especially in big towns where sufficient accommodation

accommodation to entertain a huge crowd is not available in one's own house, a public hall is rented for the performance of the ceremony unless it is decided to invite just a sufficient number to accommodate. There is otherwise, an alternative. The marriage is performed amidst a few friends and relatives in the bride's residence at the auspicious hour, the public reception being postponed to some other time in some other place, either on the same or some other convenient day. But the form of ceremony among the orthodox Burmese is more or less the same, and in Upper Burma where tradition dies hard with the people, it generally assumes the form below.

Let us revert to our previous example. X and Y, in their best attire, are placed side by side on a raised platform or a cushion, facing the crowd. X sits on the right hand side of Y, and placed in front of them are flower vases and offerings known as "kadawpwes" which consist of cocoanuts, plantains, pickled tea, betel leaves and nuts. These offerings are meant for the Three Jewels, viz: the Buddha, His Teachings, and members of His Order, the parents, the elderly guests, the Gods of the Universe and of their families. The reigning sovereigns are often included in the list of offerees. XY and YZ sit beside the bridal pair to give them in marriage, but it is not uncommon for them to appoint a saintly old couple of high social standing to act on their behalf. A brahmin ritualist often officiates at this ceremony, but any other man well versed in the ancient rituals may conveniently take his place. In fact, the services of a brahmin at such functions

functions are no longer indispensable. The writer himself has replaced the brahmin many a time within recent years.

Just before the auspicious hour is due, whosoever undertakes to officiate at the marriage ceremony gets up and explains to the gathering, the nature of the function to be performed, and calls upon the bridal pair to pay homage and make offerings to those mentioned above, while he invokes their blessings.

Now comes the auspicious moment. X is asked to extend his right hand towards Y as if he seeks for her hand, and he is supported in so doing by XY or his male delegate, whereas, YZ or his female delegate holds Y's right hand and places it above X's, in such a way that the palms of the couple clasp. This part of the ceremony is most significant in that it answers the ancient tradition of giving away the bride to the bridegroom by her parents. The ritualist then ties the hands of X and Y with a piece of silk and dips them in a bowl containing scented water. He next chants the mantras from the sacred texts, invoking the blessings of Gods and men as well as of the Buddha. The dipping of the hands in water forms an essential part of the ceremony and is mentioned in the Dhammathats as "Odapattakini" (a) which is recognized as the best form of marriage. The ritualist chants the blessings in the following terms: "From this moment onwards, may you form a happy couple; just as none can split the water by

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(a) K.M.D. (II) Sec.11.

by scratching its surface with any substance, and in the same way as it reassembles at level, may it be impossible for anyone to disturb your marriage-tie and harmony between you two by any means whatsoever; may you be blended into one like this water; may your desires forever be uniform like the water level; may your minds be clear and cool like this sparkling water; may you be cleansed of all evils and bad omens in the way this water washes off the impurities; may the blessings of health, wealth, and productivity forever increase just as this water swells the quantity of earthly things; may you become possessed of worldly powers and dignity like the Kings in whom they vest as the Holy water is sprinkled over them; may this water bestow upon you all that you desire, in forms abundant and ever-lasting".

This over, either the ritualist or some other elderly persons present at the ceremony instruct the couple in the duties of husband and wife (b) for observance throughout their lives. That is followed by an address in prose or verse being read to congratulate the couple on the occasion of their marriage.

It will, however, be noted that similar ceremonies are quite rare between parties of whom one or both had previously married. Marriages between such parties are usually performed without formalities (c).

This is a brief description of a marriage ceremony among Burmese Buddhists. But is it necessary to constitute a valid

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(b) See infra p.186

(c) Mi Me v. Mi Shwe Ma. I. U.B.R.(1910-13) p.111 P.C.

valid marriage ? According to the Dhammathats, the answer is in the negative. In Ma Gywe v. Ma Thi Da (d).Hodgkinson, J.C., cited with approval Sir John Jardine's Notes on Buddhist Law (e) that the consent of both parties is all that is essential to the contract of marriage, and that no ceremony is essential. In Mi Me v. Mi Shwe Ma (f), their Lordships of the Privy Council held that "no ceremony of any kind is essential. Mutual consent is all that is required. In the absence of direct proof, consent may be inferred from the conduct of the parties, or established by reputation".

Nor is the marriage ceremony sufficient to constitute a valid marriage. In Ma Hla Me v. Maung Hla Baw (g), Baguley, J., said: "It was strongly urged for the respondent that the ceremony itself was sufficient to establish the relationship of husband and wife, but I am unable to accept the contention. The chief difficulty is that there is no recognized ceremony of marriage among Burmese Buddhists. If a ceremony alone is enough to constitute marriage, then there must be some definite point in the ceremony before which the parties are not married. No such definite point could be indicated. The ceremony itself is not a fixed one; it depends almost entirely on the finances and wishes of the parties. Also the ceremonies differ; sometimes it is merely a case of entertaining a few of the neighbours to

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(d) II. U.B.R.(1892-96) p.194. (f) Ante. p.72.

(e) Notes I, paras.15, 22 and 23. (g) 8. Ran. p.425.

to tea and letpet.* This may or may not be followed by the rendering of obeisance to parents and elders. Then again, there may or may not be the feeding of pongyis and the making of offerings to them. No individual item seems to be essential, or by itself sufficient to constitute a marriage. My own personal view, for what it may be worth, based on more than twenty years' experience as a judicial officer, is that a marriage between Burmese Buddhists is created by cohabitation coupled with intent to become husband and wife. The ceremony is merely a way of publishing to all the world that the cohabitation which is intended to follow it, is with the intention of creating a marriage tie between the couple. In other words, the ceremony is merely a way of showing the intent of the parties; it is evidence of that intent, and is not a means of creating the tie in itself, in this way differing from the ceremony which actually brings into existence the marriage tie among Christians, Hindus and Mahomedans."

While in the circumstances proved, the actual decision in the said case seems to be correct, it is respectfully submitted that his Lordship's enunciation as a principle of Burmese Customary Law that consummation is essential to complete the status of husband and wife does not appear to be justified by the Dhammathats. This decision will be discussed

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* Pickled tea.

discussed in a separate chapter when we consider the essentials of a valid Buddhist marriage. Suffice it to say here that both the Dhammathats and the Courts agree that a marriage ceremony in itself is neither necessary nor sufficient to prove a valid marriage.

Marriage without formalities ! This worked well among the people when social life and conditions were quite different from those of the present day, Foreigners have now immigrated in large numbers to settle in this country. Communication is good and members of a family are now spread all over. They are no longer confined within the limits of their villages as in days gone by. Traders establish themselves in others' villages. Men who used to marry within the village circle now often go far afield and the old stability of established things has passed away.

In ancient days, publicity of marriage was possible without any ceremony. Were this man and woman married ? The whole village knew them; knew how they came together; knew how they lived. There could be no doubt. The elders knew and every villager besides. Nothing could be simpler than to decide such questions. No court was necessary. The parties could decide it themselves. And when there was a dispute, there were village elders who knew the facts and could, therefore, give judgment accordingly.

But conditions have changed. Whereas parties went to the village tribunals to settle matrimonial disputes in olden days, they now go to the courts for settlement. There is often

often no village tribunal which knows the matters in dispute. The husband comes from the north, and his wife from the south; they now live in a central district. How can their marriage be proved ? Marriage is a continuing status and how can it be established where the parties change places often. There is no essential ceremony which can be registered, remembered or noted. The absence of ceremony which at first was an advantage, is now a defect. A ceremony points to a fact. A status that has no determining point is often difficult to prove. A boy elopes with a girl. Are they married ? In olden days when village life was simple, such matter presents no difficulty for determination. The elders would decide it atonce. They would not tolerate any connection that was not a marriage. But now, who will settle it among strangers ?

Object of Ceremony. The object of the formalities of marriage is two-fold, viz: (1) to establish that parties have freely consented to it and that their union is lawful, and (2) to obtain publicity regarding the marriage and to secure proof of its celebration. That is why most nations have made the marriage ceremony very solemn. None should doubt that ceremonies which strike the immagination serve to impress upon the mind of the contracting parties the force and dignity of the contract as well as the seriousness of the legal obligations they assume.

The better class of the Burmese have now felt the necessity of some form of ceremony which they now perform at the marriages. The circumstances call for it. Sir John Jardine

Sir John Jardine in his Notes on Buddhist Law (h), therefore, said: "Doubtless the laws which dispense with ceremony and registration leave the door open for uncertainty, mistake and fraud; but in this respect, other civilized nations have to encounter the same evils, and the only remedy is by legislation." The prevailing inter-marriages between Burmese women and foreigners and the uncertainty and inequity of the laws that are held to govern such marriages, have caused grave anxieties in the mind of thoughtful people as to the security of the future of Burmese women.

It is high time that the parties cohabiting should know what they are about; whether they are married or they are not. Will the Government institute civil marriage offices as in Europe, and if so, will the people like them? No one can definitely tell. But the change must come. Hence, U May Oung in his Leading Cases on Buddhist Law (i) said: "The only way in which such questions can satisfactorily be dealt with is by enacting a special measure containing rules for civil marriages and for divorce in cases where one or both of the parties is or are of the Buddhist faith. The matrimonial law of the Burma Buddhist is, it is submitted, ripe for codification and should a Buddhist Marriage and Divorce Bill* be considered by the legislature, room may be found in it for provisions alleviating the present untoward and deplorable position of the women of Burma."

(h) Notes I. para. 23. (i) Part I. p.16.

* See Appendix C.

BREACH OF PROMISE OF MARRIAGE.

We have briefly dealt with the formalities of courtship and betrothal among Burmese Buddhists. How a contract of marriage springs up has also been explained(a). In this chapter, we will deal with the rights and remedies of a party to a broken marriage contract.

As already stated, section 13 of the Burma Laws Act, (XIII of 1898) lays down that "any question regarding marriage " of the Buddhists shall be decided in accordance with the principles of Buddhist Law except in so far as such law has been altered,abolished or otherwise affected by any enactment, or is opposed to any custom having the force of law.

What constitutes Promise of Marriage. The law, it appears, does not require that there must be an express promise of marriage, and such promise may be implied from the circumstances of the case. Hence, in Maung Shwe Tha v. Ma E Bon(b), where the plaintiff asked the defendant if he was going to be honest with her and he replied that although he had a bad reputation with reference to women, he would be honest this time, it was held that the words under the circumstance, constituted a promise of marriage.

Nature of Marriage Contract. Before we discuss the rights and remedies of a party against the other for breach of promise

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(a) Ante pp 64-68.

(b) 1. B.L.J. p.259.

promise to marry, it is necessary to ascertain the nature of such contract with a view to discover whether Burmese Buddhist Law or the Contract Act (IX of 1872) governs an action for its breach. If the promise of marriage does not fall within the category of " question regarding marriage " as contemplated by section 13 of the Burma Laws Act,1898, Burmese Buddhist Law will be clearly inapplicable and the Contract Act,1872 will apply. Consequently, the age of the contracting parties will have to be determined according to the Majority Act,1875, section 2(a) whereof exempts its operation only " in matters of marriage". The decisions on the points were,however, conflicting.

What Law is Applicable. Sir John Jardine in his Notes on Buddhist Law(c) said: " In a recent appeal,however, it was held by the Judicial Commissioner that a woman who has been injured by breach of promise of marriage, may sue for reasonable compensation. " But the decision in that appeal was not published and consequently, it is impossible to find out whether a promise of marriage was held to be " a matter of marriage ", within the meaning of section 13 of the Burma Laws Act,1898.

The first decision touching the point was made in Maung Hmaing v. Ma Pwa Me(d) by the Special Court on a reference made to it by the Judicial Commissioner, of certain issues, inter alia , whether as between the Burmese, an action for breach of promise of marriage would lie. Agnew,J., treated

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(c) Notes I,para 35.

(d) S.J. p.533.

treated the suit as one for damages for breach of contract and held that it would lie,because there was nothing in Burmese Buddhist Law to prohibit it. The point whether a promise to marry is a " matter of marriage " was not under reference, although the learned Judicial Commissioner in his order of reference, said: " It will of course, be remembered that it is not a case of succession, inheritance, marriage or religious usage, and consequently, it must be decided rather by the Contract Act than by Buddhist Law."

In Ma Yon v. Maung Po Lu(e), the Judicial Commissioner held that a suit for damages for breach of promise of marriage would lie among the Burmese, but the law applicable was not discussed.

But the view expressed in the order of reference in Maung Hmaing's case was accepted by Ormond,J., in Tun Kyin v. Ma Mai Tin (f).

In Upper Burma,however, Shaw,J., held in Kan Gaung v. Mi Hla Chok (g) that a promise of marriage and breach thereof are questions relating to marriage, and must therefore, be decided according to Burmese Buddhist Law. This view was accepted by Heald,J., in Maung Nyein v. Me Myint (h).

(e) II. U.B.R.(1897-01). p.499.

(f) X. L.B.R. p. 28.

(g) II. U.B.R.(1907-09) Contract,p.5.

(h) U.B.R. (1917-20) p. 75.

In his Leading Cases on Buddhist Law (i), U May Oung favoured the view expressed in Kan Gaung's case, remarking: "It is submitted that the Upper Burma view is correct, since the marriage must necessarily be preceded by an undertaking express or implied to marry, and a breach of such undertaking is part and parcel of the subject. That a promise to marry is a valid agreement under the Contract Act is true, but the law regarding contract in general was formed or grew up in connection chiefly with commercial transactions, whereas the marriage contract pertains to personal relations between the parties. But be that as it may, it is settled law that a suit of this nature is maintainable by Burman Buddhists."

This question was considered by a Full Bench of the Chief Court of Lower Burma in Maung Gale v. Ma Yin Hla(j) wherein Robinson,C.J., who delivered the judgment said: " Every marriage must be preceded by an offer and its acceptance. The prior agreement to marry is an integral part of every marriage. Any question, therefore, arising in connection with this promise must be held to be a question regarding marriage." There can be little doubt that this decision was influenced by U May Oung's view.

Some fourteen years later, the correctness of the decision aforesaid was questioned before a Full Bench of the Rangoon High Court in Maung Tun Aung v. Ma E Kyi (k), Page C.J., after distinguishing an agreement to become husband and wife

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(i) Part I, p.23.

(j) XI. L.B.R. p.99 F.B.

(k) 14.Ran. p.215.

wife in praesenti from a contract to marry in futuro, held that entering into an agreement to marry in futuro is not "an act in matter of marriage" within the meaning of section 2(a) of the Majority Act, 1875; that such agreement being antecedent to, and forming no part of the proposed marriage, suits for damages between Burmese Buddhists are governed by the Contract Act, 1872 and not by Burmese Buddhist Law. It is respectfully submitted that this decision is correct and it will be seen presently, that it has far reaching effects.

Who can Contract to Marry. It is now settled law that the contract to marry in futuro is governed by the Contract Act, 1872 and not by Burmese Buddhist Law. Consequently, the age of parties* to such contract must be determined according to the Majority Act, 1875. The age of majority is eighteen years.

In Tun Kyin's case (l), Ormond, J., held that although a promise of marriage is governed by the Contract Act, 1872 it is only voidable when made by a Burmese Buddhist youth under eighteen years of age without his parents' consent; but when he has clandestine intercourse with the woman, his parents are not at liberty to withhold their consent to the marriage and he is bound by his promise and can be sued for its breach. Apparently, there is no authority for this proposition. It is respectfully submitted that the principle of decision in the Privy Council case of Mahori Bibi v. Dharmodas Ghose (m) that

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(l) Ante. p.80

(m) 30.I.A. p.114 P.C.

*In Ma Pwa Kywe v. Maung Hmat Gyi, (1938. R.L.R. p. 667) it was held that a minor could not sue for damages for breach of contract.

that a minor's contract is absolutely void ab initio should apply to a contract of marriage; and that was the decision in Maung Tun Aung's case (n).

Rights and Remedies. The Dhammathats contained numerous passages authorizing forfeiture of gifts and to recover damages in case of breach of promise on the part of the parents (o) and of the daughter (p). But it is not necessary to go into them inasmuch as Burmese Buddhist Law is no longer applicable to suits for damages for breach of promise to marry in future.

It is now settled law that no suit for damage for breach of contract to marry is maintainable against the parents who have promised to give their children in marriage, because they are not immediate parties to it. Hence, the actual decisions in Maung Po Thaw v. Maung Tha Hlaing (q) and Maung Thein and one v. Ma Thet Hnin and one (r) still hold good. It is respectfully submitted that a suit for return of bridal presents or reasonable value thereof on an engagement being broken off, is still maintainable against the parties who have received them, on ground of failure of consideration; it does not contravene the provisions of sections 65, 72 and 74 of the Contract Act, 1872.

Specific Performance. Does a suit for specific performance of a marriage contract lie ? No such case has ever come before the Courts in Burma. Although the remedy by way of specific performance is sometimes available when there is a breach of

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(n) Ante. p.31. (p) Ibid. Sec.68, 81 & 82.

(o) K.M.D. (II). Sec.54, 56 & 74. (q) III.U.B.R. p.106.

(r) VIII.L.B.R. p.347.

of contract, the Court should not grant it where it concerns marriage, inasmuch as it involves certain rights and obligations of a personal character. This is now the law all over the civilized world, and even in the countries where Roman-Dutch Law at one time allowed specific performance, the Courts now refuse this relief and allow only pecuniary damages (s).

Damages How Assessed. As pointed out above an action for damages for breach of a promise of marriage lies against the party at fault, irrespective of sex. In Ma Ngwe Yin v. Maung Po Taw (t), however, the suit for damages brought by the man was dismissed by Parlett, J., on the findings that there was no evidence of actual loss, that there was nothing on the records to indicate that the plaintiff had suffered any injury to his social standing or reputation, and that the mere fact that the man had become the butt of his acquaintances' jests or had experienced a feeling of shame, did not constitute any injury for which damages could be awarded. It is respectfully submitted that the reasons given by his lordship for dismissing the suit were insufficient and that damages should have been awarded, as U May Oung put, "not necessarily as a solatium to the plaintiff, but rather in the nature of a penalty on the fickle defendant (u)". It is true that an analogy exists in the maxim injuria sine damno provided for in the Law of Tort.

(s) Introduction to Roman-Dutch Law by R.W.Lee. p.52.

(t) 7. B.L.T. p.14.

(u) L.C. on B.L. p.25.

It is, however, much easier to assess damages in a suit instituted by a woman. Besides ordinary damages to cover any loss sustained by her through making preparations for the marriage, special damages should also be awarded taking into consideration the social position of the plaintiff as altered by the defendant's conduct towards her, including seduction which may be taken as an aggravating circumstance, as observed in Maung Hmaing v. Ma Pwa Me (v) and Ma Ngwe Gaing v. Tun Ya (w).

It is, thus, an instance of a rare exception to the general rule that damages for breach of contract are by way of compensation and not of punishment. In case of a breach of promise of marriage, the feelings of the person injured are taken into account, in addition to such pecuniary loss as can be shown to have actually arisen. In Maung Yaung Gyi v. Ma Thaw (x), it was held that an action for breach of promise of marriage is one which is based upon the hypothesis of a broken contract, yet is attended with some special consequences of a personal wrong in which damages may be given of a vindicative and uncertain kind, not merely to repay the plaintiff for temporal loss, but to punish the defendant in an exemplary manner; that the wealth and social position of the defendant may be considered as these indicate the loss sustained by the breach of contract, and that seduction is an element to be considered in connection with the measure of damages. It is respectfully submitted that the principle for assessing damages laid down in this case is both reasonable and accurate.

(v) Ante. p.79. (w) 13. B.L.T. p.6. (x) 8. B.L.R. p.324

Marriage Brokerage Contract. This is a contract or an agreement whereby a party engages to give another a reward if he will negotiate a beneficial marriage for him. Such a contract has been described as a sort of "kidnapping into a state of marital servitude"; it obviously interferes with the freedom of choice. Hence in Maung Pyo v. Maung Po Gyi (y) it was held that a contract of this nature is opposed to public policy within the meaning of section 23 of the Contract Act, 1872 and should not, therefore, be enforced.

We will discuss in the following chapter what remedies if any, Burmese Buddhist Law provides for seduction.

(y) U.B.R. (1917-20). p.119.

SEDUCTION.

Although the early views of the Courts in Upper and Lower Burma were at variance on the point of a promise of marriage being treated as a question regarding marriage within the meaning of section 13 of the Burma Laws Act, 1898, never was a doubt expressed on the view that seduction unaccompanied by a promise to marry raises no similar question. Burmese Buddhist Law is therefore, inapplicable to matters relating to seduction. Wrong without Remedy. The earliest case on the point was Mi Kin v. Nga Myin Gyi(a) wherein the only foundation for the action was that the plaintiff by her own consent, cohabited with the defendant and so became pregnant. The Court held that the suit for damages did not lie and Burmese Buddhist Law was inapplicable. That decision was followed in Nga Po Thaik v. Mi Hnin Zan(b) although it was contended that sexual intercourse would not have been allowed unless the parties had the intention of becoming husband and wife, and that it was the idea underlying the provisions in the Manugye(c). The Court, however, held that it would be unnatural to suppose that an implied consent to marry exists wherever sexual intercourse is permitted and that it would be highly dangerous to admit such a doctrine. But the question of applying the Dhammathats to such a case can no longer arise inasmuch as it is now settled law that seduction pure and simple is not " a question regarding marriage ".

(a) S.J. p.114. (b) S.J. p. 235.

(c) Volume VI. Sec. 26-30.

The above decisions in Lower Burma were followed in Upper Burma in Ma Yon v. Maung Po Lu(d). But in Mi Hla Waing v. Nga Kan(e) , Twomey,J.C., while accepting the principle of decision in the above cases, held that where a man had agreed by private arrangement with a girl to pay damages for seduction and referred the question of amount to an arbitration, he could not in a suit to enforce the award, be heard to challenge its validity, on the mere score that the girl could not have sued him for damages.

At times, it was discovered that men seduced young girls while deceitfully inducing them to believe that they were legally married wives whereas, they were merely mistresses or concubines. Such men are liable to punishment under section 492 of the Penal Code, but cases of this kind are few and far between.

Suggested Remedy. It is unfortunate that the girl herself cannot maintain a suit for damages; but it cannot be the intention of law that a seducer of a girl should go unpunished. U May Oung favoured the view that a suit for damages for loss of services of the seduced girl should lie at the instance of the parents or guardians (f). He cited with approval, the views of Stuart,C.J., of the Allahabad High Court in Ram Lal v. Tula Ram (g) that such a suit would lie, if at the time of

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(d) II.U.B.R.(1897-01) p.499.

(e) II.U.B.R.(1907-09) Civ.Pro. p.19.

(f) May Oung's L.C. p.27.

(g) 4. Allahabad. p. 97.

of seduction, the girl was under the protection of her father or guardian and was rendering domestic service to him. He also pointed to section 142 of the Kinwun Mingyi's Digest (Volume II) as authority in the Dhammathats for that view. It is respectfully submitted that we cannot now look to the Dhammathats for guidance in such a case, but an action of the nature suggested by him may be entertained under the Law of Tort independent of Burmese Customary Law.

LEGAL REQUISITES OF A BUDDHIST MARRIAGE.

The marriage system of Burmese Buddhists has no counterpart in Hindu Law inasmuch as it definitely recognized the right of divorce and remarriage of widows. Although the matrimonial laws of the Dhammathats contained adaptations from Hindu Law, it is true as pointed out by U May Oung that "there is no adequate reason to suppose that the marriage customs of Burma have been influenced, as regards essentials, by outside agencies, except in so far as they have become tinged to some extent with Buddhistic moral teachings. Everything points towards the view that these customs have been evolved in this country, as in other lands, from primitive beginnings, with this difference, that here, there is no religious aspect (a)".

In a preceding chapter, we have considered a Burmese Buddhist marriage in its earliest aspect and how the term "Buddhist" when used in connection with matrimonial law is not only misleading but even incongruous (b). We will now proceed to deal with the legal requisites of a valid marriage in Burmese Buddhist Law.

Modes of Contracting Marriage. According to section 36 of the Kinwun Mingyi's Digest, Volume II, a Burmese marriage is contracted in one of the three ways, viz:

(a) May Oung's L.C. p.2.

(b) Ibid. p.5.

(i) when it is affected by the parents of both parties;

(ii) when it is contracted through a go-between, and

(iii) when it is by mutual consent.

Legal Requisites. The requisites of a valid marriage may be summarised as follows:

"(1) the parties must be capable as regards age and mind;

(2) they must not be within certain degrees of kindred or affinity;

(3) as regards the woman, there must be no valid subsisting marriage; and

(4) the most important - there must be consent (c)".

To these may be added consummation of marriage, as laid down in Ma Hla Me v. Maung Hla Baw (d).

Capability. With regard to capability, the Dhammathats do not lay down the age below which persons may not marry. But inasmuch as the Penal Code (e) makes sexual intercourse even with one's own wife under the age of thirteen years punishable as a crime, it may be assumed that a girl under that age is incompetent to marry even with the consent of her parents or guardians. Note, however, that under the Child Marriage Restraint Act, (XIX of 1929) which is applicable to Burmese Buddhists, no man above the age of eighteen years can marry a woman under fourteen years of age without incurring a criminal liability under section 3 and 4 of the Act. Section 2(a) defines a "child" as a

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(c) May Oung's L.C. p.4. (d) 8. Ran. p.425.

(e) Sec.375 Penal Code.

a person who, if a male, is under eighteen years of age, and if a female, is under fourteen years of age. Section 2(b) defines a "child-marriage" as one to which either of the contracting parties is a child. Under section 5, any person who performs, conducts or directs any child-marriage is punishable with imprisonment or fine, or with both, unless he proves that he had reason to believe that the marriage was not a child-marriage. Section 2(d) defines a "minor" as a person of either sex who is under eighteen years of age. Under section 6, where a minor contracts a child-marriage, any person having charge of the minor, whether as parent or guardian de facto or de jure, who promotes such marriage, or allows it to be solemnized, is likewise punishable; and until the contrary is proved, the person having charge of such minor at the time the child-marriage was solemnized will be presumed to have negligently failed to prevent its solemnization. It must be remembered that the Act does not declare such marriage void, or even voidable. No Court can take cognizance of a case under this Act except upon a complaint made by some one within one year from the date of solemnization of the marriage complained of.

Briefly speaking, section 3 will apply when a male adult between 18 and 21 years of age married a child; section 4 will apply when a male adult over 21 years of age married a child; section 5 will apply to those who performed, conducted or directed any child-marriage unless they can prove that they had reasons to believe that it was not a child-marriage,

child-marriage, and section 6 will apply to parents or guardians concerned in a child-marriage who promoted it, or permitted it to be solemnized,or failed to prevent it from being solemnized. It should also be noted that where both the contracting parties are children, i.e., the man is under eighteen and the woman is under fourteen years of age, their marriage is not a child-marriage within the meaning of section 2(b) of the Act, and consequently, sections 3, 4, 5 and 6 will not apply.

Section 12 of the Act as added by section 6 of the Child Marriage Restraint (Second Amendment) Act XIX of 1938 empowers the Court to issue an injunction against any of the persons mentioned in sections 3, 4, 5 and 6 prohibiting a child-marriage if it is satisfied by whatever means that it has been arranged or is about to be solemnized. Disobedience of this injunction is punishable with imprisonment as well as fine.

It is not clear whether the Act will apply to marriages whereof one or both of the contracting parties had been previously married, but are still "children" or "minors" as the case may be, within the definitions given in section 2; but such application appears not to have been contemplated. It cannot be doubted that the legislature enacted this Act in restraint of child-marriages which are most common among the natives of India, and the fact that it does not affect the Burmese society is obvious from the absence of prosecutions thereunder although it has been in force since 1929. For

For convenience of reference, it is reproduced in Appendix B.

Marriageable Age. It is not customary among Burmese Buddhists to give girls in marriage before they attain puberty. The Dhammathats generally exhorted the parents to give their children in marriage at the age of 15 or 16 (f). The fact that girls often wait much longer is borne out by the last Census Report, 1931 (g).

In Maung Thein Maung v. Ma Saw (h), a boy who is physically competent to marry is held capable of contracting a valid marriage without his parents' consent, in the absence of any provision in the Dhammathats to the contrary.

Impotency. In the Dhammathats (i), impotency was not recognized as a ground for divorce at the instance of a wife, but merely as a cause for which she has a right to abuse and imprecate evil on her husband. Sir John Jardine, in his Notes (j) was silent on the point, but for reproduction of the views expressed by a Burman Judge on the grounds of divorce. That officer said that the laws of Manu allowed a divorce when the husband was impotent, but cited no authority for his version. It may, therefore, be assumed that impotency is no bar to a legal marriage under Burmese Buddhist Law. This view is quite consistent with the Buddhist belief that the object of contracting a marriage in its dual aspect - moral and social, goes far beyond mere procreation

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(f) K.M.D.(II). Sec.33.
(g) Ante. 57.
(h) 6. Ran. p.340.
(i) K.M.D.(II). Sec.228.
(j) Notes II. para. 19.

procreation of mankind, and that marriage as an institution is not merely an outcome of sensuality. Sexual relationship between husband and wife can only be looked upon as a natural accompaniment of marriage, but not the sole object of marriage, and consequently, mere incompetence to consummate it should in no way affect his capacity to marry or remain a husband. This brings us face to face with a more complicated problem whether consummation is one of the requisites of a valid marriage as laid down by Baguley, J., for the first time in Ma Hla Me v. Maung Hla Baw (k) which will be discussed in a separate chapter.

Insanity. As free consent of the contracting parties to become husband and wife is the foundation of a Buddhist marriage, it is submitted that an insane person cannot contract a valid marriage. It may, perhaps, be possible for him or her to contract a valid marriage if during a lucid interval, he or she is capable of expressing free consent to marry in praesenti. It is only reasonable to expect both parties to be of sound mind inasmuch as by marrying, they will incur grave marital responsibilities which they must naturally fulfil towards each other.

Prohibited Degrees. We will now deal with the bar due to consanguinity. Again, the Dhammathats were silent on this important point. Major Sparks in drawing up a table of prohibited degrees in support of which no authority has been quoted, wrote (l);"The degrees of consanguinity are

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(k) Ante. p.91.

(l) Jardine's Notes I. para.30.

are the same as under the English Canon Law, except in the case of a wife's sister and a brother's widow, marriage with whom is permitted by Burmese Law. A man may even marry his wife's sister during the lifetime of his wife * but such marriages, as well as marriages with a brother's widow at any time, though not illegal, are opposed to public opinion, and not considered respectable: marriage with a deceased wife's sister is considered, on the contrary, a most natural and becoming union". There is no case-law on the point and the question whether a particular union is void on ground of consanguinity, if at all raised in the British Courts, will have to be determined in accordance with the prevailing custom to be tested and proved in the manner laid down in a preceding chapter.

As pointed out by U May Oung (m), many Kings of Burma "in their anxiety to preserve dynastic purity, were guilty of practices which would certainly not be tolerated at the present day and which, even in days gone by, were confined to the royal family. Thus, the union of uncle and niece, nephew and aunt, half-brother and sister was permitted, and in traditionary accounts, we even read of a marriage between full brother and sister".

As regards cousins, union with agnates is never heard of, while "that with other cognates is not looked upon with disfavour, provided that the woman is on the same line as the man or below it."(n

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(m) May Oung's L.C. p.5.

We will now deal with the bar arising out of affinity. Marriage with a brother's widow is very rare, while marriage with the younger sister of a deceased wife is not uncommon, especially when there are children by the deceased wife. It is really an advantage to the children to have their own aunt for a stepmother. The writer cannot see any special reason for not favouring marriage with a brother's widow when the latter has children by her deceased husband. The reason, if any, seems to be that the uncle is already the natural friend of his nephews and nieces who have nothing to gain in that respect by his becoming their stepfather; they can always count on his protection if they find an enemy in a stepfather who is a stranger, and if they are fortunate to find a friend in such a stepfather, they have acquired an additional protector whom they would not have, had their mother married their uncle.

Marriage with the wife of a deceased son or with the mother of a deceased wife is almost an exception and is considered as not respectable.

There is no rule of customary law prohibiting an adulterer who has been divorced or sentenced to criminal penalty from marrying the other party to the adultery.

It is, therefore, obvious that besides agnatic and cognatic relationship, the prevailing custom among Burmese Buddhists, founded not on religious scruples but on public decency or morals, recognizes the bar due to affinitas, i.e., the tie created by marriage between each person of the

the married pair and the kindred of the other, though no such bar is definitely mentioned in any of the Dhammathats. Where the right to divorce is well recognized, prohibitions due to affinitas must arise, and that is so among Burmese Buddhists.*

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* Cf. Article 983 of the Civil Code of China which is based on the Tang Code (654 A.D.) of Chinese Customary Law, and lays down that a person may not marry any of the following relatives:

"(1) A lineal relative by blood or by marriage;

(2) a collateral relative by blood or by marriage of a different rank (meaning persons of the same generation) except where the former is beyond the eigth degree of relationship and the latter beyond the fifth;

(3) a collateral relative by blood who is of the same rank and within the eigth degree of relationship; but this provision does not apply to "piao cousins" (i.e., all collaterals of the same rank of the fourth, sixth and eigth degrees, except:

(a) the children of the brothers of his father;

(b) the children born from sons of brothers of his paternal grandfather;

(c) the children descending through males from the brothers of the father of his paternal grandfather.

The marriage prohibitions between relatives by marriage provided in the preceding paragraph shall continue to apply even after the dissolution of the marriage which has created the relationship."

The absence of references to prohibitions on grounds of consanguinity and affinity in the Dhammathats and of any decisions on the point up-to-date is perhaps, an indication of thorough appreciation by the community what the prohibitions are or ought to be, and its natural tendency to avoid doubtful alliances, especially those which are repugnant to common decency or morals. Where repugnance is real, law is useless. Why forbid what nobody wishes to do ?

U E Maung in dealing with the subject, wrote; "The only reference oto prohibited degrees in Burmese legal literature is to be found in the Attarasi Dhammathat, written in 1875 by Pagan Wundauk whose official title was Thirimaharaja Thinkyan and who was appointed a Judge by King Mindon. It declares alliances between persons standing in the direct ascending and descending line of relationship to be unnatural and unlawful (n)".

Judging from the fact that the Attarasi Dhammathat was not referred to by the Kinwun Mingyi when he compiled his Digest in 1895, it appears to be an insignificant work and by no means authoritative. At any rate, the alliances declared by him as 'unnatural and unlawful' do not seem to be exclusive; he is obviously silent as to prohibitions on ground of affinity.

But when the law is codified, it will be the duty of the legislature to lay down definitely the degrees of prohibition to remove all doubts and uncertainties that may

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(n) B.B.L. p.39.

may exist in the mind of all people to be governed thereby. Some years ago, the Government appointed a Committee to draft a Bill to codify the law of marriage and divorce among Burmese Buddhists. The writer understands that a draft Bill was submitted to the Government for introduction in the local legislature, but for reasons inexplicable, it has not been carried any further. Inasmuch as the Bill was drafted by persons well conversant with the ancient law of the Dhammathats and the prevailing customs of the people, it is an important document to which ~~the~~ readers should have access; and accordingly, it is reproduced in ~~the~~ Appendix. C. The table of prohibited degrees as contemplated by clause 3(iv) will be found in the Schedule attached to the Bill. In the view of the writer, it ~~had been~~ was drawn up in accordance with the prevailing customs among Burmese Buddhists. It is only by legislation that such uncertainties can be removed.

A guardian does not marry his ward during continuance of guardianship. Such alliance is opposed to public decency and good morals.

Polyandry. We now come to the third requisite. It has been said that while polygamy is recognized by the Dhammathats and ~~it~~ still exists by sufferance, polyandry is unknown to Burmese Buddhists. It is supposed that polyandry exists only in countries where scarcity of women is produced by infanticide, or where there is a striking discrepancy in the proportion of the sexes among children as well as adults. A woman in such countries is a mere chattel and capable of

of being held jointly like other property. And it seems that economic conditions have kept this institution alive to limit the population. For instance, where a wife is shared between the brothers as in some parts of India, the children will be fewer than if each brother has a wife; and "the poverty of the people, the difficulty of paying the bride-price, their queer notions of family solidarity, want of marital jealousy and absence of any delicate conception of womanhood conspire with their environments to perpetuate the customs (o)". But in Burma, no such causes for polyandry exist. Infanticide is not tolerated by the State; nor is it permitted by the Buddhist religion which treats it as a great sin. According to the last Census Report, 1931, the proportion of females married was 498 as against 471 for males per thousand among the indigenous races in Burma. Almost without an exception, women are not treated as mere chattels. The Married Woman's Property Act, a recent flower of ~~the~~ English civilization and still unknown in France, has in effect been established for centuries in Burma. It is a solid fact that a Burmese woman has an equal status with a man in almost every sphere of life. The people, though not so prosperous are on the whole, not very poor; famine is unknown in this country as in some parts of India. And every other cause which is likely to encourage a barbarous institution such as polyandry, finds no place in Burma.

(o) Joshi's Khasa Family Law. p.84.

Consent. We now come to the question of consent, by which free consent is meant. The subject will be divided under two heads: (1) consent of the parents or guardians, and (2) consent of the actual parties to the marriage. The former embraces difficult questions of law, some of which appear not to have yet been emphatically raised before the Courts. The writer therefore, proposes to deal with this head in a separate chapter.

Consent of Parties. In dealing with the latter head, it must be said at the very outset that there can be no valid marriage unless the parties thereto mutually agree to become husband and wife. Where direct proof of consent is lacking, it may be inferred from their conduct, or established by reputation (p). The age at which a spinster can marry at her option and without fear of interference by her parents or guardians, is fixed at twenty by the Dhammathats (q). But a widow or a divorcee has no such restriction as she is free from parental control by reason of her former marriage (r). In the absence of fraud, misrepresentation, or duress, consummation of marriage is the best evidence of consent. It is, therefore, submitted that for the purpose of actual marriage, the age of consent for both sexes is determined by attainment of puberty, and not by the Majority Act, 1875. But in Maung Tun Aung v. Ma E Kyi (s) it was held that the age of parties to an agreement to marry in futuro shall be governed by the said Act, as it has

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(p) Mi Me v. Mi Shwe Ma. I.U.B.R.(1910-13). p.111 @ 112 P.C.
(q) K.M.D. (II). Sec.33.
(r) Ma E Sein v. Maung Hla Min. 3. Ran.455. F.B.
(s) 14. Ran. p.215. F.B.

has no relation to the capacity of persons to act in the matter of marriage.

Woman's Consent is Indispensable. It will, perhaps, be of interest to discover the various stages by which Burmese Buddhist Law comes to recognize the necessity of the woman's consent for the validity of marriage. It has been said that Burmese Buddhist Law had its origin in the Hindu Dharmashastra which recognizes infant-marriages, and incidentally, the absolute right of the father to give his infant daughter in marriage. Hence, a Hindu marriage is not a contract but a sacrament.

The Buddha then came into being, and in his Singalovada Sutta, laid down five duties to be observed by parents towards their children, viz:

(i) to keep them from evils,
(ii) to have them properly instructed and educated,
(iii) to encourage in them, good habits and good work,
(iv) to appoint them in marriage, and
(v) to provide them with the means of subsistence or of starting in life.

The Buddhists generally considered that good parents must conform to the teachings of the Buddha, and consequently, they incorporated those five duties of the parents in their Dhammathats for common observance. Since then, the right of the parents to give their children in marriage became fully established among Buddhist customs. But the right of a Hindu father to give his infant daughter in marriage did not fail to

to leave a wrong impression upon the mind of Buddhist parents that they could ignore the wishes of their children in performing the parental duty of appointing marriages. This view, coupled with obedience of the children to their parents as taught by the Buddha, gradually converted what in fact was merely a duty or privilege of the parents, into a right to give their children in marriage without reference to their wishes. Hence, we find in the Dhammathats, absolute right of the parents to give their female child in marriage to whomsoever they please without consulting her wish, and eventually, gave recognition to their right to demand restoration of their daughter where she eloped even with the man to whom she was betrothed, but before they had given her to him in marriage (t). This right of the parents to demand restoration of their daughter would not cease although the latter might have borne ten children (u); but later, they were enjoined to exercise it promptly (v); and where they disliked the union, they could ignore the wishes of the couple (w).

Between father and mother, the former had the preferential right to give the daughter in marriage (x). The right to dispose of a female child in marriage was next extended to her brothers, sisters, kinsmen, guardians and even an official

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(t) K.M.D.(II) Sec.100.
(u) Ibid. Sec.145.
(v) Ibid. Sec.146.
(w) Ibid. Sec.149.
(x) Ibid. Sec.69 & 71.

official of the State, in the absence of her parents (y). And for a very long time, the natural right of a female child to choose her own husband gave way to the assumed arbitrary right of her parents or guardians to dispose her in marriage without reference to her wish.

But nature soon asserted her indisputable right against artificial restraints, and the Dhammathats soon gave recognition to a woman's right to refuse cohabitation with the man she disliked. All women were divided into twenty one classes, and it was provided in the Dhammathats that any person having sexual intercourse with a woman belonging to any one of the said classes without her consent shall be punished (z). This provision virtually gave the woman a discretion to nullify a marriage arranged by her parents without consulting her wish. Thus, we find further provisions in the Dhammathats giving a woman the right to repudiate the marriage arranged by her parents by refusing consummation (a). Even then, the early jurists would not recognize the unqualified right of a woman to dispose of her heart in any way she pleases. They first extended that right to women who are over twenty years of age, or who are free from parental control by reason of their previous marriages, e.g., widows and divorcees (b). They next gave recognition to the union of spinsters under twenty years of age with the men

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(y) K.M.D.(II). Sec.70 & 71.

(z) Ibid. Sect.29.

(a) Ibid. Sec. 33 & 81.

(b) Ibid. Sec.126.

men they chose, where the parents of the former subsequently consented to it, either expressly, or by implication (c). But it was not long before they began to realise that arbitrary restrictions did not work well in a changed society which gives prominence to the right of self-determination, and it was, not without reluctance, that they recognized the validity of the union between a spinster under twenty years of age and the man of her choice, where her parents could not prevent their fourth elopement from taking place (d).

In their anxiety to preserve the parental right to appoint marriages for their female children, the jurists began to lay down that the parents should give their daughters in marriage when they attained the age of fifteen or sixteen years. It seems that this low age was fixed in order that the parents might be able to impose their choice on their daughters who at that age, were lacking in moral courage to have their own way; but they could go no further inasmuch as they were obliged to add an exhortation to the parents to marry their daughters to the men they pleased should they like to avoid scandal and disgrace (e). This view finds support of U E Maung who wrote: "In other words, may not the true view be that in the development of the Burmese Customary Laws of marriage, we have three distinct and successive stages ? The first, where the parents could dispose of their daughters in marriage without any question by the daughters ; the second, where the condition of the daughters given in marriage was ameliorated by giving them an option to repudiate the man displeasing to them; and

(c) Manugye, Vol.VI.Sec.20,22 & 23. (d) Ibid. Sect.23.
(e) K.M.D.(II).Sec.33.

and the third and last in point of development, where marriage of a daughter to a suitor, whose love was reciprocated by her, came to receive recognition, at first tardily by way of avoiding disgrace to the parents, but later, overshadowing the earlier modes almost to oblivion; in the result, modern jurists came to treat of Burmese customary marriages as a consensual contract between the parties (f).".

The first civil case in which it was definitely laid down that a woman cannot be married against her will or without her consent was Maung Taik v. Ma Cho (g). After discussing various texts contained in the Dhammathats and all the available legal literature on the subject, the learned Judicial Commissioner said: "I have no doubt that the doctrine which seems to me ~~the~~ to inspire the Dhammathats that a girl cannot be compelled to marriage against her consent, is in accordance with the customs and usages of the people. Any other view would, moreover, conflict with the Penal Code which, as noted by Mr.Jardine and Mr.Burgess, does not contemplate the marriage of any woman against her will. On grounds, therefore, of authority, precedent, the opinions of Jurists and commentators and the teaching of natural justice, I am of opinion that, among Burmese Buddhists as among other civilized people, a woman, whether a minor or not, cannot be legally married without her consent or against her will."

(f)B.B.L. p.27.

(g)II.U.B.R.(1897-1901). p.197.

Free Consent. This decision brings us back to the nature of consent required for a valid marriage. The validity of marriage is derived from free and mutual consent of the contracting parties. Free consent is absent where marriage is contracted through fraud, misrepresentation, fear or the like. Mutual consent lacks where the parties do not intend the same result. An insane person cannot, therefore, consent to a marriage.

Mistaken Identity. We shall first deal with general consent. It is submitted that in relation to a marriage contract, mistake of fact, if it has any effect, prevents its validity ab initio. Hence, in principle, there can be no valid marriage if one party marries another under a mistake as to his or her identity. For instance where X married Y under a mistaken belief that Y was Z, it cannot be said that X had at all consented to marry Y, and that marriage, it is submitted, is void ab initio. The result is that either X or Z, upon discovery of the mistake, can repudiate the other. The mistake need not necessarily be mutual, and it may even be bona fide. But it goes to the very root of the contract and renders it void.

Fraud. But where X was induced fraudulently into a belief that Y was Z and X eventually married Y, the result would be different. In the former example, the mistake excludes consent entirely, whereas in this, consent if any, is not free, having been obtained by fraud. Section 59 of the Kinwun Mingyi's Digest, Volume II dealt with similar cases where the parents

parents fraudulently showed one daughter at the time of receiving the bridal presents, but gave another in marriage to the bridegroom, or where marriage was solemnized with one daughter, but just before it was consummated, another was fraudulently substituted, and the bridegroom by mistake, had sexual intercourse with the latter. All the Dhammathats gave the bridegroom in such cases, an option to marry both daughters, and the Kaingza, Vanna Dhamma and Manu in particular, gave him the right to repudiate the marriage and to demand restoration of his presents. Section 60 dealt with a case where a son other than the one who was presented at the time of betrothal was fraudulently given in marriage to the bride. Only two of the Dhammathats - the Waru and Warulinga - were cited as authorities for giving the bride an option to marry the one she preferred. But they did not say definitely what she could do, where neither appealed to her liking. However, the Warulinga gave her the right to keep all the presents which she had received, and from this, her option to repudiate the marriage may perhaps, be reasonably inferred.

Voidability of Marriage. In both cases where marriage can be repudiated on ground of fraud, as aforesaid, it is not void ab initio, but merely voidable at the instance of the party deceived. Hence, it is necessary to distinguish a marriage which is void ab initio from that which is merely voidable. The distinction is fine, but real. In the former, there was not even semblance of consent, whereas in the latter, consent was fraudulently obtained. It is submitted that the

the result will be the same if fraud were perpetrated by the parties themselves.

Misrepresentation. Misrepresentation by either party or the parents, be it suggestio falsi or suppresio veri, seems to have similar effect upon marriage as when there is fraud. In Ma Kin v. Maung Gale (h), however, a decree for divorce was granted to the wife on the ground that the husband induced her to marry him by a misrepresentation that he was unmarried. Extracts from the Manu Wunnana (also cited as Vannana) and Manu Thara Shwe Myin (often cited as Vanna Dhamma) were relied upon in making that decision, and Aston, J.C., observed obiter that divorce would not have been possible had the marriage been consummated. It is respectfully submitted that the decision is incorrect and is not borne out by the texts cited by him. The law on the point is found in section 91 of the Kinwun Mingyi's Digest, Volume II., and the official translation of the extract from the Vanna Dhamma runs thus:

> "The parents give their daughter in marriage to a man who represents that he has no wife. If a former wife comes forward, he cannot obtain the second wife unless he gives one or two children by his former wife to the parents of his second wife, or, in the absence of children, unless he gives his former wife to the second parents-in-law. Otherwise, he shall neither obtain the second wife nor his bridal presents, because he has wrongfully brought disgrace on her family by false representation."

(h) P.J. p.130.

The extract from the Manu Vannana was not translated, as it is substantially the same as in the Kaingza, the official translation whereof reads as follows:

> "The parents give their daughter to a man who represents that he has no wife. If a former wife appears, he shall not claim to cohabit with the second wife unless he gives one or two sons by his former wife to his second parents-in-law, or in the absence of sons, unless his former wife gives him up to his second parents-in-law: failing to comply with these two conditions, the second wife shall be freed from the bond of marriage, and he shall forfeit his bridal presents; the reason being that he wrongfully brought disgrace on the family of the second wife".

It will be seen from the texts cited above as from those of other Dhammathats (i) that the wife was not given a right of divorce on ground of misrepresentation. On the contrary, it appears that the husband who was guilty of fraud, had the option to claim the deceived woman as his wife, provided he gave up his one or two children by his former wife, or in their absence, his former wife (according to the Vanna Dhamma) or himself (according to the Manu Vannana) - "presumably as slaves (j)". Where the husband complied with the conditions aforesaid, it seems the deceived wife could no longer repudiate the marriage. This is obviously inequitable. Slavery having been abolished in Burma, the conditions mentioned in the

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(i) K.M.D.(II).Sec.91 & Attasankhepa.Sec.349.
(j) May Oung's L.C. p.95.

the Dhammathats are now obsolete, and there should be no doubt that in deciding a similar case, the British Courts will now be guided by considerations of equity, justice and good conscience, if not by the prevailing custom which seems to favour repudiation of marriage as distinct from divorce by a deceived wife, as in an ordinary contract in which one of the parties is guilty of misrepresentation. The writer respectfully agrees with U May Oung that the law is the same whether the marriage has been consummated or not, there being no reason to hold that the deceived bride loses her rights by allowing cohabitation (k) as supposed by Aston J.C., in Ma Kin's case.

The Dhammathats also spoke of cases in which men were inveigled into marriage by suppresio veri. Where the bride's parents did not disclose as in duty bound, physical, mental, or constitutional defects in their daughters such as pregnancy, leprosy, deafness, blindness, dumbness, insanity, idiocy, tuberculosis, loss of virginity and the like, they gave the bridegroom the right to demand the return of bridal presents or double their value, and also to repudiate the bride subject, however, to this limitation that he shall forfeit his presents if he knew the faults at the time of marriage (1). It is significant that no mention was made of the right to divorce by either party.

(k) May Oung's L.C. p.95.

(1) K.M.D.(II). Sec.61 & Attasankhepa. Sec.340.

Coercion. It is submitted that coercion or duress will have a similar effect on the contract of marriage.

In the circumstances, it appears that fraud, misrepresentation, duress or the like are grounds merely sufficient for the repudiation of marriage under Burmese Buddhist Law and not for divorce by the innocent party. Repudiation, if made within a reasonable time has the effect of nullifying the marriage: Hence, where marriage is void ab initio on ground of mistake, or where it is nullified by repudiation, there is no subsisting marriage to require a divorce. That is why the Dhammathats did not expressely confer the right to divorce in the cases cited above. This view is indirectly supported by the fact that the texts from the Dhammathats cited in sections 60 and 91 of the Kinwun Mingyi's Digest, Volume II were compiled under Chapter VII which deals with Marriage and not with Divorce.

Mutual Consent- We will now deal with the question of mutual consent. In Ma E v. Maung San Da (m), the learned Recorder observed that no ceremony is required to constitute a Burmese Buddhist marriage and "all that is necessary is consent on both sides to live together as husband and wife". By mutual consent, therefore, is meant consent on both sides to live together as man and wife, although as observed by U E Maung, this definition may prove illusory, the more so as their Lordships of the Privy Council had rightly pointed out in Mi Me v.s Mi Shwe Ma (n) that "the same word which is used

(m) 3. B.L.R. p.8.

(n) Ante. p.102.

used to describe a woman lawfully married, is applied by the Burmese to a woman living with a man on less honourable terms". We need not here encroach upon the subject of different kinds of wives recognized by Burmese Buddhist Law; suffice it to say that the word "wife" contained in the aforesaid definition of the term "mutual consent" means a genuine wife as distinct from a mere mistress or concubine. Thus, it appears that where a man in uniting with a woman merely wishes her to be his concubine and not his wife, mutual consent is lacking to convert that union into a legal marriage. No doubt, it is difficult to prove a man's intention by direct evidence, but it may be established by general repute, or inferred from his conduct towards the woman. This subject will receive fuller treatment in the Chapter on Proof of Marriage.

To sum up, there must be no mistake as to identity of either party, and, free and mutual consent to become husband and wife is necessary to constitute a valid marriage under Burmese Buddhist Law. If either of these elements is lacking, there may be the external indicia of a marriage contract, but there is no consensus of mind, which is absolutely necessary for the validity of all contracts.

Consummation of Marriage. We now come to consummation as an extra requisite for the validity of a marriage. Previous to the decision by Baguley, J., in Ma Hla Me v. Maung Hla Baw (o), it was never considered as one of the requisites of a Buddhist marriage. The subject, therefore, demands a thorough treatment

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(o) Ante. p.91.

treatment involving discussions of various authorities cited by his lordship in support of his view. Suffice it to say here that in the humble opinion of the writer, the learned Judge's enunciation as a principle of Burmese Buddhist Law that consummation is always an essential of a valid marriage is based on inaccurate translations of the Dhammathats and is not borne out by the authorities cited by him. The point is being discussed in extenso in a separate Chapter.

Pregnancy is no Bar to Marriage. Before concluding this Chapter on the requisites of a valid marriage, it may be noted that pregnancy of the woman is no bar to marriage*. This principle may be deduced from a decision under Mahomedan Law in Maung Tun v. Mi Du Hlaing (p) which should hold good under Burmese Buddhist Law, in the absence of any express provisions in the Dhammathats to the contrary. U May Oung has rightly pointed out that "section 192 of the Attasankhepa directly contemplates marriage with a pregnant woman, the child when born being declared capable of inheriting from the husband (q)".

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* Pregnancy as a cause of marriage with its author prevails as a custom in Central Africa, Burma, Borneo, Tahiti and many places. - Westermarck, Edition 2, p.23.

(p) I.U.B.R.(1897-01) p.110.

(q) May Oung's L.C. p.9.

CONSENT OF PARENTS AND GUARDIANS.

It has been said that there cannot be a valid marriage unless the parties to it mutually consent in praesenti to become husband and wife. We will now see how far the consent of parents or guardians is necessary for the validity of a Buddhist marriage.

When Consent is Unnecessary. Although the Dhammathats (a) generally laid down that a woman should be given in marriage at the age of fifteen or sixteen years, most of them did not specify the exact age beyond which she can marry without the consent of her parents or guardians. They generally proceeded to say: "Otherwise, if they fall into sin, no offence shall be taken (b)". The Rajabala however, said that a woman over the age of twenty years may marry a man of her choice without the consent of her parents or guardians, and that was supported by the Manugye (c). Hence, the Courts treat a woman under the age of twenty years as a minor in relation to the question of marriage, under Burmese Buddhist Law. Section 2(a) of the Majority Act, 1875 has no application, in that marriage is one of the matters expressly excluded from its operation where the agreement is to marry in praesenti (d). However, a woman under twenty years of age is not regarded as a minor where she is emancipated from the control of her parents or guardians by reason of her previous valid marriage (e).

(a) K.M.D.(II). Sec.

(b) Ibid. Sec.33

(c) Book VI.). Sec.28.

(d) Maung Tun Aung v. Ma E Kyi, 14.Ran. p.215.

(e) K.M.D.(II). Sec.126.

Natural Guardians. The persons entitled to the control of a young virgin are specified in section 71 of the Kinwun Mingyi's Digest Volume II. Sir John Jardine, in his Notes on Buddhist Law (f) listed them as follows, in order of preference: "While the father is alive, he alone can dispose of her; failing him, the mother; and failing both parents, the brothers and sisters. If there are no such near relations, other relations have apparently a similar right if the girl is actually under their care and protection, i.e., grandfather, grandmother, maternal aunts and uncles, and paternal uncles and aunts. The Governor or head of the town is also mentioned as a protector. The Dhammathat (Manugye) does not specify which of these more distant relations is entitled to priority of guardianship; but its meaning as expressed in section28, appears to be that the person actually taking care of the girl has a right to control her marriage; and it might be argued that the guardian appointed by the Civil Court under Act XL of 1858 would have the same right as he is saddled with as much responsibility as the Governor or head of a town".

Guardians Appointed by Court. The appointment of guardian of the person of a minor is now made by a Civil Court under section 7 of the Guardians and Wards Act, 1890. In making such appointment, the Court is guided by various considerations set out in section 17(2) of the Act, for the welfare of the minor. In the absence of any suitable friends or relatives

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(f) Notes I, para.12.

relatives who desire to be appointed as guardian of the minor, the Collector of the district in which the minor ordinarily resides may be appointed by the Court.

Duties of Appointed Guardian. Section 24 of the Guardians and Wards Act, 1890 insists upon a guardian charged with the custody of the ward, to look to the latter's support, health and education, and "such other matters as the law to which the ward is subject requires". A minor Buddhist female under the age of eighteen years is a minor in respect of whose person a guardian can be appointed under the Act. Whether marriage is covered by the term "such other matters as the law to which the ward is subject requires" is yet undecided, but it seems to be so. In that case, such guardian can consent to the marriage of his ward.

Court to Decide Disputes. Where there is a dispute upon the question affecting the ward's welfare between the guardians when there are more than one, and possibly between the guardian and the ward, the Court may, on the application of any person interested, or any one of the guardians, or of its own motion, make such orders as it may deem fit to regulate their conduct, under section 43 of the Act.

Termination of Appointed Guardianship. The authority of such guardian ceases under section 41 on the marriage of the female ward unless her husband, in the opinion of the Court, is totally unfit to be the guardian of her person. That is so although the ward may not have attained the age of eighteen years at the time of her marriage. Where the Collector is

is the guardian, he acts in all matters connected with the guardianship of the ward subject to the control of the Government or such other authority as the Government may by notification in the official gazette, appoint in this behalf, under section 23 of the Act.

State Officials as Guardians. From the texts cited in section 71 of the Kinwun Mingyi's Digest Volume II, it is obvious that it was customary in ancient days for officials of the State to give girls in marriage as their guardians in the absence of near relatives to protect them; but the writer is not aware of any case, reported or otherwise, in which a girl sought the sanction or approval of the Court or such an official, before or after her marriage to ensure its validity.

Delegation of Parental Authority. The Dhammathats recognized delegation of parental authority to give the minor girl in marriage to their relatives, when by reason of old age, disease, or infirmity, the parents were incapable of exercising it personally. When such authority was delegated, the delegate could exercise the parental authority. Section 70 of the Kinwun Mingyi's Digest, Volume II, mentions about delegation of such authority not only by the parents but also by the grand-parents of the girl. The texts cited clearly suggested that delegation of authority was permissible only among the kindred.

Whose Consent is Necessary for Marriage. Where both parents are alive, it appears that consent of both is necessary to

to give a minor daughter in marriage. Where they differ, the will of the father, as the head of the family, prevails over that of the mother (g). If the father is dead, the mother's consent is sufficient. Unless the father has actual custody, he has no control over his illegitimate child. This is so, even under the Guardians and Wards Act, 1890 (h). Under Burmese Buddhist Law, where the parents are divorced and the child upon attaining the age of discretion chooses to live with the mother, the father loses his control over it, and where the mother has remarried, the step-father, if he has its custody, will be preferred to the natural father for its guardianship (i). It is submitted that in the case of an illegitimate daughter under twenty years of age and living with her mother, the latter's consent and not that of the father is necessary to appoint her marriage. Likewise, the consent of the natural father appears to be unnecessary where the minor daughter, following the divorce of her parents, has lived with her her mother ever since she attained the age of discretion, or where she has been given away by her parents in adoption to others.

Nature of Consent Required. The consent of the parents or guardians required by the Dhammathats may be either express or implied, as laid down in Ma E Sein v. Maung Hla Min (j). It may be given either before or after the elopment of a young

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(g) K.M.D.(II).Sec.69 & 71.

(h) Ma Myo and one v. Maung Kyan. 8.L.B.R. p.415.

(i) Po Cho v. Ma Nyein Mya & three 5.L.B.R. p.133

(j) 3.Ran. p.455. F.B.

young couple. The ratification after the elopement has the same effect as previous consent.

It is submitted that an insane parent or guardian, so far as concerns consent, is treated as non-existent and the same consent, if any, is required and sufficient as would be sufficient if he or she were already dead.

Implied Consent. The Dhammathats laid down the circumstances from which consent may be implied. According to the Manugye (k), where a young man while working for the parents of a minor girl, had carnal knowledge with her, with their knowledge and her own consent, they should not dispute that the couple had attained marriage status. Likewise, where a couple after the elopement returned to the village of her parents, or stayed in a neighbouring village openly for some years, the girl's parents should not cause their separation (l). Similarly, where the parents knowingly permitted their minor daughter to have clandestine intercourse with a man for days and months, their consent should be implied (m). In Maung Chit Pe v. Ma Tin (n), a minor girl returned to her parents' house after elopement with a man, and they lived and ate there as man and wife. Robinson, J., held that the consent of the parents must be implied from their conduct towards the couple.

Consent is not Necessary to Create Marriage Status. Can a spinster under twenty years of age contract a valid marriage

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(k) Vol.VI. Sec.20. (m) Ibid. Sec.99.

(l) K.M.D.(II). Sec.146. (n) 3. B.L.T. p.43.

marriage under any circumstances without the consent of her parents or guardians ? This question was raised in Crown v. Chan Mya (o) before a Full Bench of the Chief Court of Lower Burma. Thirkell White, C.J., declined to answer this question saying that it was not directly in issue, but Irwin and Fox,JJ., answered it in the affirmative, the former observed inter alia: "Sections 21, 22 and 23 must be read together, and the true interpretation seems to be that a test of the real intention of the parties is necessary, and that if the girl is steadfastly determined to marry her lover, and he continues to be of the same mind, the rights of the guardians must give way before accomplished facts". This view was dissented from in the Upper Burma case of King Emperor v. Nga Ni Ta (p) by Adamsom, J.C., and also in Maung Chit Pe v. Ma Tin (q) which was heard on the Original Side of the Chief Court of Lower Burma, wherein Robinson, J., doubted its correctness, and held that it was merely an obiter dictum. Thus, the point remained unsettled for some years.

In Ma E Sein v. Maung Hla Min (r), Maung Ba, J., referred for decision by a Full Bench of the Rangoon High Court whether a girl under twenty years, who is not a widow or a divorcee, can contract a valid marriage without the consent, express or implied, of the parents or guardians under Burmese

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(o) I.L.B.R. p.297. F.B.

(p) I.U.B.R.(1902-03) Penal Code. p.15.

(q) 3. B.L.T. p.43.

(r) Ante. p.120.

Burmese Buddhist Law. Robinson, the then Lord Chief Justice, reviewed the decisions referred to herein above and answered the issue in the negative after referring to section 33 of the Kinwun Mingyi's Digest, Volume II, and section 28 of Volume VI of the Manuggye. The Lord Chief Justice said: "There is no doubt that the Dhammathats contain a large number of texts relating to the rights and duties of parents and guardians and that the control they exercise over minors is a distinct and marked feature of Burmese Buddhist Law; and to hold that a minor girl could, by the exercise of her unguided impulse by running away with her lover, absolutely set at naught and take no account of the control of her parents or guardians, is entirely contrary to very prominent provisions of Burmese Law. ..... The Dhammathats no doubt enjoin upon parents and guardians the necessity to marry minors at the age of fifteen or sixteen so as to prevent their falling into sin, but they expressly, as it seems to me, maintain the position that even though parents or guardians do not pay any regard to the rule enjoined upon them, it is only when the girl has a right to contract a valid marriage without their consent(s)". After discussing the texts in the Dhammathats, his Lordship continued: "Having regard to these provisions, and having regard to the provisions accorded to parents and guardians with reference to control over the children, especially in the matter of their marriage, there can, in my opinion, be no

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(s) Ibid. p.463.

no doubt that no minor girl under the age of twenty can contract a valid marriage without the consent or against the will of her parents or guardians, or of the relations under whose protection she is living (t)". His Lordship then considered the provisions of sections 21 and 22 of Volume VI of the Manugye and finally concluded that the consent of the parents or guardians may be either express or implied from their conduct, and that "although there was no valid marriage to start with, the connection may be converted into a valid marriage "with effect from the date of their elopement by such consent given to it afterwards. Brown and Maung Gyi, JJ., merely concurred. It appears that this decision was influenced in no small measure by the views of U May Oung expressed in the following terms:"A perusal of these texts, devoid of contradictions, leaves no room for doubt that the consent of parents or guardians is essential to the validity of a marriage with a minor girl, and this being also the case under other systems of law,it is submitted that it should now be declared authoritatively for Burmese Buddhists (u)".

With greatest respect to the great learning of U May Oung and the Lord Chief Justice, the writer begs to differ from the main decision in Ma E Sein's case which remains unchallenged up-to-date. It is respectfully submitted that where a minor girl eloped with her lover, without her parents or guardians' consent, it is incorrect to say that there was "no valid

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(t) Ibid. p.463.

(u) L.C. on B.L. p.9.

valid marriage to start with ". If that were true, no status of marriage would subsist between the parties until the union is subsequently ratified by her parents consenting either expressly or by implication. It is submitted that the said decision purports to create an intermediate stage between marriage and clandestine union. This view,however, does not receive the support of the texts from the Dhammathats which will be dealt with presently. The writer will first refer to the texts relied upon by the Lord Chief Justice in Ma E Sein's case.

The text from the Rajabala cited in section 33 of the Kinwun Mingyi's Digest,Voulme II runs as follows:

> " After her attaining the age of twenty years, a woman may marry a man of her choice although her guardians may not approve of the marriage. The reason is that her guardians did not give her in marriage when she arrived at a marriageable age ".

This passage is clearly no authority for the proposition that if a woman under the age of twenty years married a man of her choice without her parents' or guardians' consent, no status of marriage was created between them. All that the text said was that a woman over twenty years of age was free to marry anyone she chose; it meant no more.

Section 28 of Volume VI of the Manugye, it is respectfully submitted, was not accurately translated by Richardson. The relevant portions cited by the Lord Chief Justice were reproduced in section 11 of the Kinwun Mingyi's Digest,Volume II.

It is not possible to check Richardson's translation with the official translation of the Kinwun Mingyi's Digest inasmuch as section 11 of the latter was not translated. Why such an important provision in the Digest should have been omitted from the official translation passes the writer's comprehension. The relevant portions should be translated thus:

" I will now treat of the women who are spoken of in the commentaries on the sacred books: 1st, a woman taken care of by her mother; 2nd, one taken care of by her father; 3rd, one taken care of by both parents; 4th, one taken care of by her brother; 5th, one taken care of by her elder sister; 6th, one taken care of by her relations; 7th, one taken care of by her sect; 8th,one taken care of by her friends of similar religious habits. To have carnal knowledge with these eight women if they consent, is not a (sexual) sin, and (the men) will not be consigned to hell. If the guardians do not consent,(the women) cannot say they will marry; (the men) cannot say they will make them wives. Why is this? - because, the guardians do not permit. A woman who has a protector *, a woman serving a term of imprisonment awarded by the King or his officers; to have carnal knowledge with these two is sinful, and (the transgressor) cannot be exempted from payment of compensation on the score that they consent to it. Why is this? - because, there is some one

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* Sarakkhita , in the Dhammathats ,means a woman who was intended to marry a particular man while she was still in her mother's womb.

"one who has intended (to marry), to guard and to communicate with them. As regards the eight women above-noted, if their guardians and protectors fail to give them in marriage to suitable (persons) and in consequence, they have carnal knowledge with young men (of their choice) by mutual consent, let them have a right to live together if the women are above twenty years of age, and they wish to do so. Why is this? - because, the guardians and protectors do not guard the woman's sense of touch; they only guard her person ".

It will be seen from the aforesaid translation that the classification of women in the Manugye text was made without reference to age. The jurist merely reproduced twenty classes of women mentioned in the sacred commentaries to explain when a man having carnal knowledge with women belonging to certain classes with or without their consent as the case may be, should be deemed to have committed a sexual sin (v). The jurist in fixing twenty years as the age of discretion for unmarried girls, placed no reliance whatsoever on the Buddhist scriptures. It is wrong to suppose that under the sacred law, there cannot be a sexual sin merely because the woman with whom carnal knowledge is had happens to be over twenty years of age, if otherwise such a sin has been consummated. The jurist unfortunately, mixed up the commentaries on the sacred books with expressions of his own views or of other jurists

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(v) Infra p. 171-173

jurists in earlier Dhammathats.

It must again be emphasised that the classification of women in the above text was made without reference to age. The terms: "If the guardians do not consent, (the women) cannot say they will marry; (the men) cannot say they will make them wives" also have no reference to minority. The jurist simply declared that a woman over twenty years of age, having attained the age of discretion, can live with any man she chooses, without interference by her parents or guardians. Nowhere was it definitely laid down as a principle of Burmese Customary Law that the status of marriage cannot subsist between a girl under the age of twenty years and the man she loves unless her parents or guardians consent to their union. The writer will now deal with other texts from the Dhammathats cited by the Lord Chief Justice.

Section 21 of Volume VI of the Manugye is in the following terms:

> "If the parents of a young woman shall not give her away, but she shall be stolen (seduced) away, even if she has had ten children, they have the power to cause her to separate from (the seducer) and give her to another; the man has no right to say she is his wife. Why is this ? - because a daughter belongs to her parents".

The words: "the man has no right to say she is his wife" are misleading. Prima facie, it appears that no status of marriage subsists between the couple, but that is not so. The

The writer will explain this be referring to some other texts from the Manugye and other Dhammathats later in this Chapter (w).

Section 22 of Volume VI of the Manugye, it is respectfully submitted, was not accurately translated by Richardson. It laid down the circumstances from which the consent of the parents may be implied, and further declared that the parents could not exercise their right to separate the couple after the girl had given birth to two or three children, or a period of five or ten years had lapsed since they came to live in the same or a neighbouring village. The last few lines of this section escaped the notice of the Lord Chief Justice. Richardson translated them as follows:

> "If when ordered to make compensation, he offers to live with her, he shall not retain her if she does not consent; let her be released from all obligations as his wife, and let him pay the price of his body".

The terms "ဗယ်းအဂ္ဂကတ်ရေ" should have been translated as : "let her be freed from the status of a wife". It is, therefore, significant in the sense that it presupposes the existence of marriage status from which the girl will be released, if she does not consent to live with the man any longer.

More texts from the Dhammathats are not wanting to support the writer's view that status of marriage is acquired independent of the consent of the parents or guardians of a

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(w) Infra. p. 138

a minor girl. Some of them are reproduced hereunder.

The first few lines of the text from the Dhamma cited in section 71 of the Kinwun Mingyi's Digest Volume II runs as follows:

"If a daughter is given in marriage to a man by the mother, elder sister, brother, grand-parents, maternal aunts, paternal uncles, mother's elder brother, father's elder sister, governors or magistrates, the father shall have the right to revoke the marriage if he does not approve of it, and marry her to another man".

This translation, it is respectfully submitted, is inaccurate, and not to the point. It should read as follows:

"If a daughter whom both parents (should) give in marriage is given in marriage by the mother, etc... if the father does not know and consent (to that marriage), let there be a right to divorce; let him to whom the father has given (her) get her".

The word "ကွဲ " must be translated as divorce, and the right to divorce implies the existence of marriage status between the couple.

Again, the extract from the Manugye cited in the same section of the Digest appears not to have been correctly translated. The term: "အဘရုင်းမသိသမျှကိုမထိမ်းမြား၊ မိုင်ခြေ အဘလေးသူသာလင်ဖြစ်စေ" has been officially translated as: "the

"the marriage shall be invalid if it is without the knowledge and consent of the bride's father. Only he to whom her father gives her in marriage shall be her husband". The correct translation should read thus: "(The persons mentioned above) have no right to give her in marriage so long as her natural father does not know (about the marriage); he alone to whom the father has given (her) shall be her husband". It will be seen from the Burmese texts that there is no mention at all about the validity of the marriage in those circumstances; neither is there any mention about the father's consent. The passage read as a whole, serves as no authority for the proposition that status of marriage is not created between the parties unless the minor girl was given in marriage by her parents or guardians, or with their consent. It simply laid down that the father has the paramount authority to give the minor daughter in marriage and also gave a list of other persons in order of preference who are competent to act in his place after his death.

The texts from the Kandaw and Kyannet cited in this section of the Digest are not authorities on the point.

It is, therefore, respectfully submitted that the heading of section 72 of the Digest, viz: "In the absence of parents, brothers, or sisters, marriage with a girl is valid only when she is given away by her guardian" is not justified by the texts cited thereunder.

The Kinwun Mingyi's Digest Volume II contained numerous

numerous texts from the Dhammathats dealing with the rights of parents (x). The texts cited in section 69 and especially from the Rasi and Rajabala declared that the father has the absolute right to appoint his daughter in marriage, and where the mother has given her in marriage without his consent, he has the right to take back the daughter and give her to a man of his own choice. In support of that theory, the jurists cited the following suitable illustrations:

> "A trader whose boat was capsized and who was thereby rendered helpless asked a fisherman to rescue him, promising him that he would give his daughter in marriage. He was rescued from a watery grave by the fisherman, and in pursuance of that promise, he took home the fisherman with him. On his arrival, he found that his daughter had already been given away in marriage by her mother. Both parents disputed each other's right of control over their children and went before Manu the Rishi. He said that as the mother was like the soil on which crops were raised and the father like the tiller of the soil who raised the crops, so the latter should have absolute control over the children. The following case was decided in accordance with the above rule. In the reign of Narapati, builder of the Tupayon pagoda, the father of a girl desired

(x) Sec.69, 71, 100, 145, 146, 147, 148 & 149.

desired to give her in marriage to his nephew, while the mother wanted her for her nephew. Both parents came before the King for the settlement of their contention. The King considered that as a son properly belonged to the father and a daughter to the mother, the latter should be favoured. But the King's councillors said that when King Vessantra - the Embroyo Buddha, gave away in charity his wife and children, it must be presumed that he had complete control over them and that considering that fact, a man should be deemed to have control over even his wife, leave alone his daughter. The King accordingly decided in favour of the father, and the Nats (gods) applauded the decision."

The official translation of another text from the Dhamma cited in section 145 of the Kinwun Mingyi's Digest Volume II is in the following terms:

"If a man elopes with a girl who is under the guardianship of her parents, they still have the right to separate her from him, although she may have obtained ten children".

It is respectfully submitted that the translation is not strictly accurate. It should be rendered as follows:

"If a man elopes with a girl who is under the guardianship of her parents and makes her his wife, if the protecting parents say they shall not live together, let (her) have the right of divorce although she may have ten children."

The official translation of the second text from the Manugye cited in the same section reads as follows:

"Although a daughter may have born ten children after elopement, her parents still have the right to separate her from the man with whom she eloped, and give her in marriage to another man. The former shall not claim her as his wife, because a daughter is under the control of her parents".

Here again, the translation is not correct. It should be rendered thus:

"This is an instance of law where there is a right of divorce although the husband and wife do not say they want to divorce: a daughter under the guardianship of her parents eloped with a man to whom her parents have not given her in marriage and she has had ten children (by him). The couple do not say there shall be a divorce; they desire to live together; yet if that woman's parents separate them, let

let her have the right to divorce. So said Rishi Manu".

The official translation of the text from the Kungyalinga cited in 146 of the Kinwun Mingyi's Digest Volume II reads thus:

"If the parents of a girl who eloped with a young man make no objection, the young couple shall continue to live as man and wife".

The texts cited in section 149 of the said Digest are in similar terms. The official translation of the text from the Dhamma is as follows:

"If a young man and a young woman have clandestine intercourse, the parents of the latter shall not be compelled to give their daughter in marriage should they disapprove of the union, but the parents of the former are not at liberty to withhold their consent to the marriage. If the young man repudiates the young woman, he shall pay her his kobo; if on the other hand, she refuses to accept him, she shall not be compelled to pay any compensation. The rules apply when the parties belong to the same class, i.e., when both belong to the poor or to the wealthy class."

The writer respectfully submits once more that the

the said translation does not fit in with the text itself. It should read as follows:

> "Where a girl and a young man belonging to the same class, i.e., when both belong to the poor or wealthy class, live,together and have clandestine intercourse without the knowledge of (her) parents, if parents of the girl do not approve of the union, (the girl) has the right of divorce; if the parents of the young man do not approve of it, there is no such right of divorce (on either side); if the young man repudiates, let him give his kobo to the girl; if the girl repudiates, let her be freed (from marriage tie)."

The text from the Manugye cited in the same section (not translated) should be translated thus:

> "If the girl's parents disapprove (of the union), they have the right to separate (the couple); if the parents of the young man disapprove of it, they have no similar right; if the young man dislikes,let him pay his kobo; if the girl dislikes, let her be free (from marriage tie). This is the law where they belong to the same class, i.e., poor or wealthy."

The text from the Manu (not translated) and cited in

in the same section of the said Digest should be translated as follows:

> "If the father of the girl does not approve of (the union), he shall require his daughter to divorce ; the young man's father cannot assert his right of control (over her); if the young man does not desire her, she can have his kobo; if she does not desire (him), she is not at fault".

Doctrine of factum valet . From the authorities cited above, it is obvious that status of husband and wife subsists between the couple who eloped by mutual consent to become man and wife and lived together,notwithstanding lack of parental or guardian's consent. Mere elopement without mutual consent and " desire to marry and live as man and wife in future " does not,however, constitute a valid marriage(y).

In the writer's opinion, the doctrine of " quod fieri non debuit factum valet " (That which ought not to be done is yet valid when done) should apply; and under this doctrine, a marriage without proper consent of the parents or guardians, or performed even in contravention of an injunction issued under section 12 of the Child Marriage Restraint Act,1929 will be valid as factum valet, provided there is neither force nor fraud and the parties are otherwise competent to contract a valid marriage, i.e., they are not within the prohibited degrees and the woman has no subsisting valid

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(y) Ma Hla Me v. Maung Hla Baw, 8.Ran.425 @ 433.
Ma Ngwe Ma v. Maung Po Yin , A.I.R.(1931) Ran. p.177.

valid marriage. It is respectfully submitted that consent of the parents or guardian is not a condition precedent for the validity of marriage, and the guardianship so far as marriage is concerned is not so much a right as a duty.

Incidents of Marriage without Parental Consent. The marriage is valid ab initio, but if the girl's parents disapprove of the union, they have a right to separate (ခွါ ပိုင်ခွင့်) or may require their daughter to divorce (ကွါ) her husband. It seems that the girl can repudiate the marriage or divorce her husband although her parents remain indifferent to the union, presumably on the premise that a man who took advantage of the indiscretion of a minor girl without consulting the wishes of her parents must pay the penalty of her indecision in relation to matrimony. Thus, the term: " the man has no right to say she is his wife " appearing in section 21 of Volume VI of the Manugye * simply means that where the minor girl, either of her own accord or at the instance of her parents, seeks a divorce, the man cannot defend the suit by merely pleading that she is his wife.

Only Parents can Force Separation. It must be pointed out that although the specified relatives of the minor girl can appoint her in marriage in order of preference as laid down in section 71 of the Kinwun Mingyi's Digest, Volume II, none but her parents has the right to separate her from her husband, or to require her to divorce him for want of parental or

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* Ante p.128.

or guardian's consent(z). All the texts from the Dhammathats mentioned above assigned that right only to the parents and not to the guardians, and that is quite consistent with the Buddhist scriptures inasmuch as only the parents have the duty imposed upon them by the Singalovada Sutta(a) to appoint marriages for their children.

Suits by Parents to Enforce Separation. The parents may file a suit to enforce separation of the couple where they disapprove of the union. This right subsists only before the girl attains twenty years of age. To such a suit, the couple should be made defendants. Where both or one of the defendants are minors, i.e., under eighteen years of age under the Majority Act, 1875, the ~~X~~ minor should be represented by guardians ad litem under the Code of Civil Procedure, 1908 (b). The death of the girl's parents, or of either defendant, or the attainment of majority (i.e., twenty years) by the girl during the pendency of the suit shall cause the suit to abate.

Woman's Right of Divorce. Where the woman who has married before she is twenty years of age without her parents' or guardian's consent, no longer desires to cohabit with the man she ~~may~~ divorce him. She may exercise that right by living apart from him and refusing further consummation of marriage with intent to sever the marriage tie. If he husband files a suit for restitution of conjugal rights, it is respectfully submitted that it should be dismissed. But she ~~also~~ it seems must

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(z) K.M.D.(II) Sec.100,145 & 146. (a) Ante p. 103.

(b) Order XXXII. Rule 3.

must exercise that right before she attains the age of twenty years.

Point for Determination. Both in a suit to enforce separation instituted by the parents, and in the husband's suit for restitution of conjugal rights, the point for determination is whether the parents of the young woman had consented to the union of the couple either before or after the elopement , expressly or by necessary implication. If the issue is answered in the affirmative, the parents' suit shall be dismissed ,and the husband's suit decreed.

Period of Limitation. The parents' suit to enforce separation, it is respectfully submitted, shall be instituted before their daughter attains the age of twenty years and within a reasonable time. The texts from the Manugye and Manu cited in section 146 of the Kinwun Mingyi's Digest Volume II fixed the period at five or ten years; those in the Dhamma said that the right shall not be exercised by the parents if their daughter had borne two or three children, whereas the Kyannet alone fixed the period at five months or one year. The texts from the Dhamma, Manugye, Rajabala and Manu cited in section 147 of the said Digest enjoined upon the parents not to cause rupture of marital relationship if their daughter had previously been restored thrice and they failed to prevent her fourth elopement with the same man from taking place. The texts cited in section 145 of the said Digest authorizing the parents to separate their daughter from her husband even though she might have borne ten children must now be regarded as obsolete. British Courts

courts will now insist upon such suits being instituted promptly and without unreasonable delay, as conditions of life now prevailing are quite different from what they were when those Dhammathats were compiled. Whether the institution is prompt or not will be decided with due regard to the special circumstances obtaining in each case.

Courts May Overrule Parental Objections. Although the Dhammathats insisted upon the consent of the parents being obtained for a peaceful cohabitation of the couple where the spinster woman is under twenty years of age, it appears that the Courts have authority to overrule their objection in cases where it is clearly established that they withhold their consent foolishly, unjustly or unreasonably. This should be so as the Dhammathats in enlisting the consent of the parents, aimed to secure the interests of the woman whom they considered to be a minor. The texts from the Dhamma, Manugye, Rajabala and Manu cited in section 147 of the Kinwun Mingyi's Digest Volume II lent support to this view. The translations of the relevant passage from the Manugye reads as follows:

> "If a young woman shall be taken away from her parents with her own consent, let the young man restore her to them three times; as the young woman is consenting, it shall not be called 'theft'. If he be accused before the Judge of stealing her, and he decides that they are to live together, and they do so, let them be considered as man and wife, and let the parents of the man pay the law expenses".

The translation of the text from the Manu cited in the same section of the Digest is in the following terms:

> "If a young man elopes with a girl, his parents shall restore her to her parents three times. If she elopes again for the fourth time, her parents cannot demand her restoration; and if, in the event of their instituting legal proceedings before that, the Judge decides that the young couple shall become man and wife, the legal expenses shall be borned by the young man's father and paid to the Judge".

From the texts cited above, it is obvious that the Judge in ancient days could veto the objections of the girl's parents and declare the couple as man and wife, against the wishes of the parents, even before the fourth elopement. In the writer's view,a modern Court has not only the right to do so, but also a duty cast upon it to exercise that right in suitable cases. That it is not contrary to the present day sentiments of the Burmese public is apparent from the provisions of sections 14 and 15 of the Buddhist Women's Special Marriage and Succession Act,1939* which authorize the Court to impose fines on wrongful objectors and also to declare the proposed marriage to be fit for solemnization under the Act.(c). But only very exceptional circumstances amounting to an absolute abuse of the parental authority will

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* See Appendix.D.

(c)

will justify interference with such matters.

If the parents succeed in separating the couple, or the girl divorces her husband on the score that her parents' consent is lacking, it is respectfully submitted that the child conceived or begotten by her before the separation or divorce should be legitimate and treated as a "Pubbaka" child, if its mother remarries.

To sum up, it is respectfully submitted that the principle of law laid down in Ma E Sein's case that a woman under the age of twenty years, unless she is a divorcee or a widow, cannot contract a valid marriage without the consent or against the will of her parents or guardians, or of the relations under whose protection she is living, is incorrect; that the learned Judges who decided that case were misled by inaccurate translations of the Dhammathats; that in the view of the writer which is amply supported by the texts in the Dhammathats, a spinster under the age of twenty years if otherwise competent to marry, can elope with a young man who has attained puberty and by mutual consent to marry and live as man and wife in future, create as between themselves a status of marriage, lack of consent of her parents, guardians or relatives notwithstanding; that such marriage is ab initio valid, although her parents may sue to separate the couple; that she may, of her own accord, also divorce him by refusing further consummation, and that none besides the parents of the girl has the right to cause rupture of the couple's marital relationship. But so long as the decision in Ma E Sein's case stands, it must

must be remembered that the consent of the parents or guardians or of the relations under whose protection a spinster under the age of twenty years is living, is absolutely necessary for the validity of her marriage.

Marriage Status is not Affected by Penal Liability. The customary law on the validity of marriage is in no way affected by a man's liability to criminal prosecutions for kidnapping a minor under sixteen years of age from the keeping of her lawful guardians under section 363 of the Penal Code, or for contracting a child-marriage under the Child Marriage Restraint Act, 1929. The penal liability does not render void, the marriage of a minor, if it is otherwise valid according to the customary law.

CONSUMMATION OF MARRIAGE.

What is meant by the consum-mation of marriage ? According to the Dhammathats, it signifies sexual intercourse alone (a). It is thus, a natural accompaniment to and an incident of marriage. But is it always necessary to create the status of husband and wife between the parties ? The answer is by no means simple.

It is, indeed, surprising that this question was not specifically raised before any Court in Upper or Lower Burma until 1930 when Baguley, J., sitting on the Appellate Side of the Rangoon High Court, dealt with it in Ma Hla Me v. Maung Hla Baw (b). The facts of the case were as follows: The parents of the parties to the suit gave them in marriage, and a marriage ceremony befitting their status in life was performed. But immediately after the marriage ceremony and before consummation had taken place, there arose a quarrel between the parents of the couple and a separation followed. In the suit by the man for restitution of conjugal rights, the learned Judge held that there was no consummation of marriage, that a marriage ceremony is in itself not sufficient to create the marriage tie and that consummation is always essential to complete the status of husband and wife between the parties. This decision was cited with approval without further discussions in Maung Tun Aung v. Ma E Kyi (c) and Ma Kyin Mya v. Maung Sit Han(d).

(a) K.M.D.(II).Sec.9.

(b) 8. Ran. p.425.

(c) 14 Ran. p.215. F.B.

(d) R.L.R.(1937). p.103.

It is submitted that the first part of the decision in Ma Hla Me's case that the ceremony in itself is not sufficient to create the status of marriage is correct. "It is no more if it takes place, than evidence whereby the fact of their mutual agreement can be proved (e)". It is but an outward expression of mutual consent between them to become husband and wife in praesenti, a normal requisite of every valid marriage. Hence, Sir John Jardine wrote (f): "But the banquet or the joining of hands may be some evidence of consent, although that sort of evidence may be over-ruled by proof that there was no consent or acquiescence, as for example, by showing that immediately afterwards, the girl repudiated by quitting the man". There is also a series of decision including that of the Privy Council in Mi Me v. Mi Shwe Ma (g) that no ceremony of any kind is essential to constitute a valid marriage.

It is respectfully submitted, however, that the second part of the decision in Ma Hla Me's case that consummation is always a requisite of every Buddhist marriage appears not to be justified by the texts of the Dhammathats cited by the learned Judge, nor was it a point in issue in the circumstances of the case.

(e) Ma Kyin Mya v. Maung Sit Han, Ibid. p.107

(f) Notes on Buddhist Law; Marriage how contracted para.23, p.5.

(g) I. U.B.R.(1910-13) p.111 at 112 P.C.

In the case under reference, it is clear that the parties were given in marriage by their parents. There are ample provisions in the Dhammathats to support the view of the Learned Judge that in such a case, consummation of marriage is necessary to create the status (h).

Let us first refer to three kinds of marriages mentioned in section 36 of the Digest. They are:

(1) marriage affected by the parents of both parties;

(2) marriage contracted through a go-between; and

(3) marriage by mutual consent.

U May Oung, commenting upon these three forms of marriage, said (i):"It is doubted whether this was intended to be a logical division, but all writers on Buddhist Law have apparently treated it as such. From a consideration of the Burmese original, it seems probable that the first method was intended to apply to persons under-age, more especially young women who could not marry without the parents' consent; and the third to persons over-age and those who although under-age, have been emancipated from parental control. The second way - marriage through the intervention of a third party - applies to both classes." In the view of the writer, this commentary on the provisions of section 36 aforesaid goes too far. The Dhammathats made no reference to age of the parties in making this classification. There is nothing to warrant the supposition that the first kind of marriage was intended to apply to persons under-age, especially to

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(h) K.M.D.(II).Sec.87. (i) L.C. on B.L. p.4.

to women who could not marry without their parents' consent; and the third to persons over-age, divorcees and widows, irrespective of age.

The Attasankhepa (j) mentioned three kinds of wives, viz: (1) a wife married because given in marriage by the parents, (2) a wife obtained through a go-between, and (3) a wife married with consent. In the writer's opinion, this classification of wives is logical and it fits in with the three forms of marriage mentioned in section 36 of the said Digest which made no reference whatsoever to the age of the women.

In the view aforesaid, it is possible for a woman to become the wife of the man to whom her parents have given her in marriage. However, it is now settled law that her consent is necessary for its validity (k). It may be that her wishes were not consulted by her parents before the marriage was performed. The first form of marriage mentioned in section 36 of the said Digest must therefore, be distinguished from the third form which takes place by mutual consent of the parties; and because of this difference, the requisites for the validity of each form of marriage also vary.

In giving decision in Ma Hla Me's case, Baguley, J., relied upon certain sections of the Kinwun Mingyi's Digest Volume II (l); but a careful scrutiny of the texts relied

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(j) Sec. 336

(k) Ante. p.107.

(l) Sec.39, 48, 49, 50, 62, 81 & 87.

relied upon by his Lordship, it is respectfully submitted, shows that they do not justify the general enunciation as a principle of Buddhist Law that consummation of marriage is always necessary to create marriage status between the parties. The writer will now proceed to deal with the texts from the Dhammathats cited by his Lordship to see how far that view finds support in them.

Section 39 of the Kinwun Mingyi's Digest Volume II is an extract from the Kyetyo Dhammathat. The Pitakat Thamaing in which all the important Dhammathats were mentioned, made no reference to it, and according to the Kinwun Mingyi (m) the name of its author and the date of its completion were not to be found in the work itself. The extract dealt with seven kinds of marriage and the last relevant portion thereof reads as follows:

"ထိုသို့ထိမ်းမြားခြင်း ခုနစ်ပါးတို့တွင် ချင်းတို့ နှစ်ယောက်လည်း အလိုတူကြဖေ။ အဓိဘာဒ ချင်းလည်း အလိုတူကြ၍ ဒုံးအိပ်ကို စပ်ကြလျှင် လင်မယား ဖြောက်ကြဖေ။"

The official translation of the said portion is obviously inaccurate and not literal. That it refers only to the second kind of marriage mentioned in the text, is purely a surmise. The translation should read thus:

"Of these seven kinds of marriages, if the parties agree, (or) their parents agree and they consummate the marriage, let them become husband and wife."

The passage cited above speaks of three elements, viz:

(m) K.M.D.(II).Trans.Sec.4. p.13.

viz:

(1) consent of the parties,

(2) consent of the parents, and

(3) consummation of marriage.

According to the official translation of the text, only the combination of the first two elements (found incidentally, only in the second kind of marriage mentioned therein) followed by the third element, i.e., consummation, constitutes a valid marriage. But that is not the law. The writer respectfully submits that the first element, i.e., consent of the parties, suggests a reference to the third kind of marriage mentioned in section 36 of the said Digest, i.e., marriage by mutual consent, and for this kind of marriage, consummation appears to be unnecessary. The second and third elements should be read jointly, because the word "ඉ" which is equivalent to "and" was advisedly used there as a conjunctive. Those two elements combined constitute the first kind of marriage mentioned in section 36 of the said Digest, i.e. marriage affected by the parents of both parties: and only in this kind of marriage it is respectfully submitted is consummation essential to create the status between the parties. If the said three elements were conjunctively construed, it would necessarily mean that there can be no marriage unless all those elements are present. But that is not the law of the Dhammathats which does not insist upon the presence of the second element where the woman is free from parental control. The use of the words "ලැබී" after

after expressing the first element in the text is to prevent joint reading of the first with the other two elements that follow. This view of the writer, if accepted will bring the text in line with the settled law of the Dhammathats.

Section 48 of the Kinwun Mingyi's Digest Volume II reads as follows:

> "If a daughter is given in marriage to a man who is dependent on her family, she becomes his wife, provided that the marriages has been consummated." - The Mano.

Section 49 of the said Digest is also in the following terms:

> "If a daughter is given to a man who cures her of a disease from which she is suffering, he shall obtain her to wife, if he has consummated the marriage. But if the parents are unwilling to give her, and if the marriage has not yet been consummated, her kobo shall be given to him instead." - The Mano.

It is obvious that the texts cited in both sections 48 and 49 of the said Digest dealt with the case of a girl whom her parents had given in marriage to a suitor, presumably without reference to her desire, and where marriage is affected by the parents as in the said two cases, it is respectfully submitted that consummation is necessary for its validity.

Section 50 of the same Digest made no reference to consummation of marriage. The texts cited there simply

simply exhorted the parents to give their daughters to men whom they are determined to marry, if they desire to avoid scandal and disgrace.

Section 62 of the Digest dealt with two types of cases, firstly of men who after the betrothal but before the marriage, had carnal knowledge with women other than the betrothed, and secondly, of men who after the marriage but before consummation, had carnal knowledge with women other than to whom they were married. In both these cases, the texts cited therein declared that the men could not claim the women to whom they were betrothed or married as their wives, if the latter did not agree; they gave the women the right to forfeit the bridal presents on the score that they and their parents had been put to shame by the men's infidelity. Here again, all the texts dealt with the women who were given in marriage by their parents. Consequently, it was rightly decided that there was no marriage status between the parties for lack of consummation of marriage.

Section 82 of the Kinwun Mingyi's Digest Volume II dealt with cases in which the parents accepted the bridal presents and gave their daughters in marriage to the men whom the latter disliked. Here also, it was rightly decided that no status of marriage existed between the parties as there was no consummation of marriage. Baguley, J., in referring to this section said: "Again in section 82, we find extracts from Dhamma and Manugye to the effect that when there has been a marriage and the bride elopes with another man before

before consummation of marriage, the bridegroom shall get back the presents that he gave, the marriage expenses and the bride's ornaments, but if the bride elopes after consummation of the marriage, he shall be entitled to all the properties brought to the marriage by the bride, and the man who elopes with her shall also pay compensation as an adulterer; in other words, after consummation of the marriage, and not before, the bridegroom has the full rights, in this respect, of a husband (o)". It appears that the learned Judge was referring to section 81 and not to section 82 of the Digest, wherein no texts from the Dhamma and Manugye are traceable. The mistake was inadvertent. The writer respectfully submits that the texts cited in section 81 and 82 referred to cases in which the parents gave their daughters in marriage, and for the reasons aforesaid, no status of marriage was created for want of consummation of marriage.

In dealing with section 87 of the Digest, the learned Judge said that it is "probably the nearest to the point, for in this section, six Dhammathats say definitely that if a marriage has not been consummated, the relationship of husband and wife has not yet been established." The writer desires to point out that this section also relates to a woman appointed in marriage by her parents. The official translation of the texts cited herein is incompleted and misleading, inasmuch as it does not show as the original texts do, that the section dealt with a woman whom the

the parents had given in marriage to a man who proved unfaithful before consummation of marriage had taken place. Complementary to this section is section 68 of the Digest which also dealt with a woman appointed in marriage by her parents and who refused to consummate it. In those cases, it was rightly decided that no status of husband and wife was established as the marriage was not consummated. It may be pointed out incidentally that the official translation of section 68 is also misleading and inaccurate in that it omits to indicate as the original texts do, that in the cases cited therein, the women were given in marriage by their parents.

Strictly speaking, there are two modes of becoming husband and wife among Burmese Buddhists, viz:

(1) marriage affected by the parents, and

(2) marriage by mutual consent.

The other mode mentioned in section 36 of the Kinwun Mingyi's Digest, Volume II, viz: marriage contracted through a go-between, falls under one of the two modes mentioned above, when approval of the parties or their parents as the case may be, is sought through a match-maker, and the parties are eventually married. The consent of both contracting parties is essential in all three forms of marriage (n).

What then does consent mean ? The answer will be found in the Chapter on the requisites of a valid marriage (o).

(n) Maung Taik v. Ma Cho. II U.B.R.(1897-01) p.197.

(o) Ante. p.90

Suffice it to say here that consent contemplated by Burmese Buddhist Law is both free and voluntary. It falls within two categories, viz:

(1) consent required for an agreement to marry *in futuro*, and

(2) consent to become husband and wife *in praesenti*.

Clandestine intercourse following an agreement to marry *in futuro* does not create a change of status in the parties to it. Such an agreement may not be the precursor of a marriage; it neither affects the status of the parties to the contract, nor does it form an integral or any part of the proposed marriage. But an agreement to marry *in praesenti* is contemporaneous with the cohabitation with intent to become husband and wife, and it forms an integral part of the marriage (p).

How is consent to marry *in praesenti* expressed ? Where the marriage is of the first kind, i.e., when given by the parents without consulting the wishes of the parties, it is best signified by consummating it. Hence, the Dhammathats insisted upon consummation for its validity. The parties may withhold such consent by refusing consummation; the right of repudiation is not forfeited until the marriage is consummated. In the second kind of marriage, i.e., when it takes place by mutual consent, consent may be expressed either orally or in writing (q) and also by consummation; it may also be inferred from their reputation and other form of

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(p) *Maung Tun Aung* v. *Ma E Kyi*. Ante. p. 145
(q) Chan Toon's P. of B.L. p.14.

of conduct, as held in Mi Me v. Mi Shwe Ma (r). But consummation here is not an indispensable requisite as in the case of the first kind of marriage. The status of husband and wife comes into being from the moment mutual consent in praesenti is otherwise established within the knowledge of the parties and not necessarily of outsiders. Repute is only one of the means of proving the status of marriage; it is but circumstantial evidence from which that status may be inferred. It does not by itself create that status. In other words, the marriage status is a personal affair requiring no publicity; if not, marriage will be impossible unless there is some one else to bear testimony to it. This however, is not the law. It is respectfully submitted that all that is necessary is consensus of mind between the contracting parties, and once it is there, the marriage is complete and the status is created.

The writer's view that consummation of marriage is not always a requisite finds support in the treatise on Burmese Buddhist Law by U E Maung whose knowledge of the subject is sufficiently deep to merit the respect of both the Bench and the Bar. After discussing the decision in Ma Hla Me's case (s) - his interpretation of section 39 of the Kinwun Mingyi's Digest Volume II is not strictly similar to that of the writer - he observed: "Sections 48, 49 and 52 of the Digest also, referring as they do to cases where the daughter was given in marriage obviously without prior reference to her wishes, the

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(r) Ante. p.146.
(s) Ante. p.145.

the provisions therein that till consummation, she does not become the wife of the man to whom she is given cannot be made the basis of a general principle that in all cases consummation is ncessary to complete the status of husband and wife (t)". He then concluded his observations saying: "In this view of the history of marriage customs of Burma, consummation though a normal accompaniment to and incident of marriage, would not be a condition precedent in the creation of the status in the last of the three kinds of marriages, namely, marriage by mutual consent (u)".

On the face of the texts from the Dhammathats cited herein above, the writer is inclined to go so far as to say that a woman has the right to repudiate the marriage not only when she is given in marriage without consulting her wish as observed by U E Maung, but also where she has only given her consent to marry in futuro as distinct from that in praesenti. The text from the Manugye cited in section 87 of the Kinwun Mingyi's Digest Volume II makes that clear. Hence, if she subsequently alters her mind, she can repudiate the marriage by refusing consummation.

Where consummation of marriage is disputed it is difficult to prove. The mere fact that the couple had slept in one room unless they had done so continuously for a considerable time, is no evidence of it having taken place. But where a couple had lived openly as man and wife under the same roof after the

(t) BB.L. p.23.

(u) Ibid. p.28.

the marriage in such circumstances as to render consummation possible, a strong presumption arises that it had taken place. There is also a presumption that where marriage is in fact established, it is valid in law unless a legal marriage is impossible between them. That is so under Hindu Law (v).

Where consummation of marriage is procured by fraud, misrepresentation or coercion, it will not satisfy the requirements of the Dharmathats. But inasmuch as it is a fact which is difficult to prove by external means, it is submitted that it should be inferred from surrounding circumstances.

If consummation of marriage were a requisite for its validity, complications are bound to arise in a case like this. The parents gave their son and daughter in marriage and a ceremony was performed on a grand scale. Soon after the marriage ceremony but before the marriage was consummated, the bride or the bridegroom suddenly died of heart-failure. Is the surviving spouse as the case may be, a bachelor or a widow? Who will inherit the estate of the deceased ? The answer to this problem, in the view of the writer, depends upon whether the parties had agreed to marry in praesenti. If they had, then there was the status of husband and wife between the couple, lack of consummation notwithstanding (w), inasmuch as the marriage was capable of being treated as one by mutual consent. But where the agreement between them was

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(v) Bai Kashi v. Jamnadas. 14 Bom.L.R. p.547.
Indar Sing v. Thakur Sing. 2 Lahore . p.207.
(w) Cf. Jardine Notes I. para.22.

was only to marry in futuro, or where the marriage ceremony was held without reference to the desire of one or both the parties to it, then the status of husband and wife was not formed between them, in that the marriage had not been consummated.

Innumerable cases had come up before the British Courts including the Privy Council for decision what constitutes a valid Burmese Buddhist marriage, previous to 1930. If consummation of marriage were among the requisites, it is inconceivable why they did not say so previously. On the other hand, their Lordships of the Privy Council laid down in Mi Me's case (x) that "mutual consent is all that is required and in the absence of direct proof, consent may be inferred from the conduct of the parties or established by reputation". Nor had U Chan Toon, U May Oung and U Tha Gywe who had written tretises on Burmese Buddhist Law, said anywhere in their works that consummation is an essential of every valid marriage. Sir John Jardine also had never observed to that effect in his Notes on Buddhist Law.

Instances from the sacred books are not wanting to refute the theory that marriage unless consummated, is not valid. It has been said and cannot be over-emphasised that a Buddhist marriage is not merely an outcome of sensuality and has higher objects than mere procreation of mankind. Among several instances to be found in the sacred books, the Suvannasama Jataka - the life story of the Embroyo Buddha in the third of the last ten existences, and the Udayabadda Jataka - one of

(x) Ante. p.146.

of the 550 stories preached by the Buddha, bear testimony to the correctness of the view that the status of marriage can exist between the parties without consummation of marriage. In both the aforesaid stories, the couples were given in marriage by their parents although they detested sexual relationship. Consequently, they never consummated the marriage; yet , they acquired the status of marriage, inasmuch as they consented to become husband and wife in praesenti and lived together as such. That is, perhaps, the reason why impotency is not recognized by the Dhammathats as a bar to marriage, or a ground for divorce(y).

For the reasons given above, the writer respectfully submits that the decision by Baguley,J., in Ma Hla Me's case, in so far as it purports to enunciate as a principle of Buddhist Customary Law, that consummation of marriage is always essential to its validity, is not borne out by the texts from the Dhammathats which he has relied upon. The fault mainly lies with the inaccurate, incomplete and misleading translations of the passages cited in the Kinwun Mingyi's Digest to which alone his lordship appears to have access for guidance. It is hoped that some competent persons will, in the near future, undertake to revise the translations of the Digest and Manugye - a task by no means easy and simple. But the only way of surmounting all the difficulties is to codify the Customary Law, and until that is done, the present unsatisfactory state of affairs is bound to continue.

(y) Ante. p.94.

CHAPTER XV.

PROOF OF MARRIAGE.

In ancient days, marriage was a simple affair. The village was a large family unit, and the people residing there were mostly inter-related by marriage. Even where they were not so related, they knew one another so well that no union between a man and a woman of the same or neighbouring village could have escaped their notice or comment. The village life was simple; their standard of morality was much higher, and they did not generally tolerate unions between men and women unless the parties intended to create the status of marriage. Hence, it appears that the village tribunals in olden days had no difficulty in deciding whether a cohabiting couple had been married. The headman and his petty officials also noted down the names of each newly married couple as forming a fresh unit for taxation, and in the circumstances, the status of marriage was easy to prove.

But the present day conditions are entirely different. Easy communications between different places encourage frequent changes of residence, and the ancient character of family solidarity is fast dwindling away. Besides, large towns have grown up in commercial and industrial centres where foreigners have come to settle and do business. This leads to mixed alliances between women of indigenous races and foreigners which within recent years have surprisingly increased. Matrimonial disputes are not referred to the village tribunals as in ancient days, and parties often have recourse to Courts for settlement. Yet, there is a singular dearth of authority as

as regards the legal requirements of a valid marriage and the degree of proof necessary to establish the status of marriage among ~~the~~ Buddhists(a).

How to Prove Marriage. Marriage may be proved by one or more of the following means,viz:

(1) by admission of the parties;

(2) by inferring ~~the~~ its existence from proved facts;and

(3) by repute.

Admission. Where the parties admit their status freely,either orally or in writing, no further proof is required. It therefore, appears that where either spouse gives the other a written acknowledgement that they have been legally married according to Buddhist custom, they will be regarded as man and wife without further proof, if there is no legal impediment to render marriage between them an impossibility. In such a case, it will be necessary for the Court to discover whether the parties are reputed as man and wife. Circumstantial evidence is not required where there is direct proof by way of admission. It is therefore, respectfully submitted that consummation of marriage is unnecessary to create the marriage status where the parties have otherwise established their mutual consent to become husband and wife(b).

Inference. In the absence of direct proof, marriage may be inferred from the conduct of the parties towards each other. Where the parties had lived together for some years openly as man and wife and there is evidence to show that they were all along regarded as such by their friends and neighbours,there

(a)Maung Son v.Ma Thet Nu, 10.B.L.R.p.166 @ 168.(b)Ante. p.156

there is a very strong presumption that the parties are husband and wife(c)*. But joint-residence and eating together are no longer requisites of a valid Buddhist marriage(d). Separate residence does not prevent a woman from attaining a marriage status, but it gives rise to a presumption though not irrebuttable , that a woman staying away from her husband is only a " tawpyaung " (inferior wife) who is not entitled to share her husband's estate unless she had lived with him during his lifetime(e).

Circumstances for Consideration. The following circumstances should be taken into consideration, where reliance is placed upon the conduct of the parties to establish the marriage status:

(1) whether the parties had lived together openly;

(2) whether they behaved towards each other, especially on the death of one of them, in a manner usual between husband and wife;

(3) whether they visited their friends and relatives jointly;

(4) whether they visited the pagodas and monasteries together;

(5) whether their parents and relatives treated them as a married couple;

(6) whether the character and positions of the parties and their parents are such as to render marriage probable;

(7) whether there are circumstances to indicate that the relationship between the couple is regarded by their

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(c) W.R.Vanoo Gopaul v.R.Kritsnaswamy Mudaliar. 3.L.B.R.p.25. S.Anamalay Pillay v. Po Lan. 3.L.B.R. p.228.

(d) Ma Gywe v.Ma Thi Da. II.U.B.R.(1892-96) p.194. (e) Infra. p.181

* See Ma Kyin Hlaing v. Maung Kyin Swi. R.L.R.(1937).p.90.

their friends and neighbours as clandestine or illicit;

(8) whether the man was previously married, or has a wife living with him;

(9) whether the couple had bought any properties, and carried on trade or business in their joint-names;

(10) whether the issues of the couple, if any, are treated in a manner worthy of legitimate children, by their father; and

(11) whether the couple had ever performed public functions and ceremonies, and invited the people in their joint-names.

It is the cumulative effect of consideration of the said circumstances which will enable the Court to decide whether the parties are legally married under Burmese Buddhist Law.

Repute. From earliest days, disputed marriages were decided by repute, and the Manugye (f) gave a traditional account of one of the decisions by the young cowherd, who afterwards became the Rishi Manu, as follows:

"The disputed wife.- Two men disputed the possession of a wife. When they came before this wise man, he enquired into the case. Both the men claimed the woman and she declared one to be her husband. It would appear that the man the woman says is her husband, should have her, but on the statement of the woman only, the case is not clear. So he separated the three and

(f) Vol.I. p.14.

and examined them apart; but being all of one village, their statement as to forefathers, n names, numbers and heriditary property, agreed. "The case cannot be decided by the questioning of ordinary men. It must be decided by the ordeal of water, rice, fire or (hot) lead; one of these four." Having said this, he called their parents, relatives, connections and neighbours and examined them. They all agreed in stating one to be her husband. He then said: "It shall not be tried by ordeal. Let the man all agree to be the husband have the wife ..... On this occasion, the Nats (gods) of the forests and hills praised and shouted applause. This also is one decision."

In Mi Me v. Mi Shwe Ma (g), their Lordships of the Privy Council observed that "where proof of marriage depends wholly or mainly on reputation, the circumstances of the case must be scrutinized with some caution, because, the word (maya) which is used to describe a woman lawfully married is applied by the Burmese to a woman living with a man on less honourable terms".

Where marriage is sought to be established by evidence of repute, it is necessary to make sure that there are conditions necessary for its existence. "It is not superfluous to suggest that, first of all, there must be somebody of neighbours, many or few, or some sort of public, large or small, before repute

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(g) I. U.B.R.(1910-13) p.111. P.C.

repute can arise (h)." The Court should realise the difference between the social life of people living in villages from that of people residing in large towns in weighing the evidence of repute. U May Oung, therefore, rightly observed (i): "At the present day, life has changed, more especially in the cities and large towns. With the admixture of alien elements, ideas of neighbourly regard have all but vanished in many places, and each house-hold goes its own way without much concern for the affairs of others. Hence, it may happen that a marriage is contracted, without show or ceremony or feasting, unknown to the people of the locality. For instance, where the contracting parties have been married before, it is not usual to have an entertainment; unless the pair lived together openly as man and wife, it might possibly be difficult to prove the marriage in such a case."

It is the duty of the Court to find out whether the evidence adduced by the plaintiff is compatible with the view that the defendant was the plaintiff's mistress rather than his wife, and in so doing, the circumstances set out above (j) should always be considered.

Where an opinion is expressed by a witness that the couple are man and wife, it cannot be admitted into evidence unless that opinion is supported by his own conduct. In Maung Son v. Ma Thet Nu (k), the village headman assessed the couple to capitation tax as a married pair. His conduct in so doing, renders evidence of his opinion regarding their relationship admissible.

(h) Ma Wundi v. Ma Kin, 4 L.B.R. p.175 @ 179. P.C.
(i) May Oung's L.C. p.20. (j) Ante. pp.163-164. (k) Ante.p.162.

Proof of Reunion after Divorce. Where the parties divorced after the marriage, evidence of their reunion must be as good and clear as the one necessary to prove a valid marriage, had there been no divorce (l). Mere clandestine reunion is insufficient to revive the status between them (m). In Mi Saing v. Nga Yan Gin (n), it was held that where the parties to a divorce reunite after separation, the status quo ante is restored completely as if there had been no divorce.

(l) Maung Lu Gyi v. Ma Nyan, II. U.B.R.(1892-96) p.202.

(m) Maung Po Lat v. Ma Ngwe Ma, U.B.R. (1917-20) p.182.

(n) 11. B.L.T. p.89.

TWO WIVES.

It has been said that polygamy is prevalent among the Burmese though to a very limited extent (a). In this respect, a Buddhist marriage is quite different from a marriage in Christendom which is a voluntary union for life, of one man with one woman to the exclusion of all others.

With the advance of civilization among the Burmese, polygamy as an institution is soon dying out, and in the present state of Burmese society, especially among the educated classes, it has almost disappeared. U Tha Gywe is, therefore, right in saying that "the leading principle of Buddhism is rather monogamy than polygamy; polygamy is rare; it is tolerated but not largely practised, because it is considered disrespectable, and there are clear indications that it will become a thing of the past in the near future (b)".

In the view of the writer, polygamy was never practised to a large extent even in ancient days. It was recognized rather as an existing institution than with approval (c). Of the thirty-six Dhammathats digested by the Kinwun Mingyi, only the texts from three of them mentioned about the right of a man to have more than one wife (d). Even those texts did not give him the right unconditionally. The extract from the Kaingza reads thus:

"A man may marry as many as ten wives if he can maintain them all by his own skill and labour. Although his parents may give him

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(a) See Chapter VIII: p.59.
(b) B.L. Vol.I. p.91.
(c) Mi Me v. Mi Shwe Ma I.U.B.R. (1910-13) p.111.
(d) K.M.D.(II).Sec.253.

him in marriage to another woman after he had already been married to one, the parents of the first wife shall not recover her".

It is therefore, apparent that the right to marry more than one wife was extended only to those who could maintain them all by their own skill and labour. And that was why polygamy was common especially among the official class in Upper Burma before the annexation (e).

In Ma In Than v. Maung Saw Hla (f), the Special Court of Lower Burma held that at Buddhist Law, where no special custom existed, a husband who in the lifetime of his first wife married a second wife without the first wife's consent, did not thereby commit a fault against the first wife, and that such a second marriage did not in itself constitute in Lower Burma, a ground for divorce. This decision was over-ruled by a Full Bench of the Chief Court of Lower Burma in Ma Ka U v. Po Saw (g) wherein Hartnoll, J., rightly observed: "From a consideration of these texts, it seems to me clear that the Dhammathats do not in themselves sanction unlimited polygamy with the exception of the texts quoted in section 253 of the Digest, even supposing that the meaning and intention of those texts is to so sanction it. The Dhammathats seem to allow polygamy or the taking of a second wife under certain exceptional cases, and that is all, and they contemplate that

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(e) Mi Kin Gale v. Mi Kin Gyi, I.U.B.R. (1910-13) p.42 @ 47.
(f) S.J. p.103.
(g) 4. L.B.R. p.340. F.B.

that the ordinary social life should be monogamous. There is authority for holding that the taking of a lesser wife and consequent ill-treatment of the chief wife shall end in the husband having to leave the house and forfeit the property, and certain texts go even further and authorize the obtaining of a divorce by the wife when her husband takes a second wife." (h)."

In the circumstances, it is a serious matrimonial fault for a man to marry a second wife without the consent of the chief and during the lifetime of the latter. The chief wife is entitled to demand a separate residence for herself, and where her husband refuses to provide her with it, she may claim maintenance from him under section 488 of the Code of Criminal Procedure.

In Maung Hme v. Ma Sein (h), a Full Bench of the Chief Court of Lower Burma laid down the rule that except for the grounds set out in sections 219, 232, 265, 266, 267 and 311 of the Kinwun Mingyi's Digest Volume II (i), a chief wife can obtain a divorce against her husband who has taken a second wife without her consent. This decision still holds good.

(h) IX.L.B.R. p.191. F.B.

(i) These sections allow the husband to marry a second wife during the lifetime of the first wife when the latter is inter alia barren, or is she bears only female children, or where she is leprous, insane, consumptive, maimed, blind or paralysed, or if she habitually uses vile and abusive language to her husband.

In the circumstances, although their Lordships of the Privy Council distinctly recognized polygamy among Burmese Buddhists in Mi Me v. Mi Shwe Ma (j), it is clear that it now exists merely by sufferance. But inasmuch as it still subsists among the Burmese however inextensively it may be, it will be necessary to deal with the different kinds of wives under Burmese Buddhist Law.

Five Grades of Wives. The Dhammathats mentioned five grades of wives among Burmese Buddhists, viz:

(i) a slave-wife for whom a price is paid;

(ii) a wife whose status is lower than that of her husband;

(iii) a wife who occupies an equal status with her husband;

(iv) a wife whose status is higher than that of her husband, and

(v) inferior wife (ဖေါ်းကြင်).

Twenty Classes of Women. Mention was also made of twenty classes of women with whom it is sinful to have carnal knowledge (k). The classification is as follows:

(1) Māturakkhita - a woman taken care of by her mother;

(2) Pīturakkhita - a woman taken care of by her father;

(3) Mātupīturakkhita - a woman taken care of by both her father and mother;

(4) Bhāturakkhita - a woman taken care of by her brother;

(j) Ante. p.169.

(k) K.W.D.(II).Sec.226.

(5) Bhaginīrakkhita - a woman taken care of by her elder sister;

(6) Ñātirakkhita - a woman taken care of by her relations;

(7) Gottarakkhita - a woman taken care of by her sect;

(8) Dhammarakkhita - a woman taken care of by her friends of the same religious habits;

(9) Sarakkhita - a woman who is intended to be the wife of a particular man when she was yet in the womb of her mother;

(10) Saparidanda - a woman who is punished by the King or officers of the State;

(11) Dhanakkita - a woman slave bought with and taken by giving property;

(12) Chandavāsinī- a woman who lives together with a man by mutual consent;

(13) Bhogavāsinī - a woman who lives together for wealth and comfort;

(14) Patavāsinī - a woman who lives together with a man by mere gift of clothings;

(15) Odapattakinī - a woman who lives together after the vow of fidelity has been made by dipping the hands in the water bowl.

(16) Obhatasumbhadā - a woman who lives together by the removal of the load from her head;

(17) Dasībhariyā - a slave wife;

(18) Muhuttika - a woman who lives together with a man for a short while only;

(19) Kammakaribhariya - a servant wife, and

(20) Dhajahata - a captive woman.

It is not sinful for women of classes 1 to 8 to have carnal knowledge with men inasmuch as they and not their parents or guardians have the fullest control over their senses; nor do men commit a sin if such women consent to sexual intercourse. But women of classes 9 and 10 are treated differently, in that they are not entirely free from third party control; so are women of classes 11 to 20 who are called "wives". Following the religious teachings of the Buddha, the Dhammathats said that any man having carnal knowledge with a woman belonging to classes 9 to 20 whether or not she consented to it, committed a sin.

Muhuttika Wife. The term "Muhuttika wife" is defined in the Kinwun Mingyi's Digest as a courtesan appointed as such by the King. If she has carnal knowledge with another man before discharging the payment of a prior visitor, both are said to have committed the offence of adultery (1).

Wives not in Legal Sense. It may thus, appear that the women belonging to classes 11 to 20 mentioned above are recognized as wives by the Dhammathats. But this classification was influenced by religious and moral considerations as distinct from the positive rules of law; it was borrowed from the Samantapasadika Viyana Atthakatha which was Buddhaghosa's commentary on the five books of Vinaya Pitaka which contained the rules and regulations of the Buddhist priesthood. Buddhaghosa

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(1) K.M.D.(II) Sec.331.

Buddhaghosa lived in or about the 5th century A.D. and his commentaries, viz: the Samantapasadika and Vissuddhimagga, formed the chief sources of the purely Buddhistic portions of the Dhammathats.

It is submitted that not all ten classes of wives mentioned above had legal rights against the men with whom they associated.

Six Kinds of Sons. The Dhammathats laid down the following six kinds of sons who were entitled to inherit (m):

(1) Orasa - son born of a couple given in marriage by their parents;

(2) Hetthima - son born of a "tawpyaung";

(3) Khettaza - son born of a slave-wife;

(4) Kittima - son adopted with an intention that it shall inherit from the adoptive parents, and

(5) Pubbaka - son brought to the subsequent marriage by either spouse; and

(6) Apatitthika - son casually adopted with no intention that it shall inherit from the adoptive parents.

Dhammathats Recognized only Three Kinds of Wives. From the aforesaid classification of sons who are entitled to inherit, it may be inferred that the Dhammathats recognized only three kinds of wives, viz:

(a) a "superior" wife (ဖခါးကြီး) who gives birth to an Orasa son;

(m) K.M.D.(I) Sec.16.

(b) a "tawpyaung" or "apyaung-maya" (ဖေါ်:ဝေ)
who gives birth to an Hetthima son; and

(c) a "slave-wife" who gives birth to a Khettaza son.

Wives other than the aforesaid three, had no legal rights as against the men with whom they united and were not wives in the strict sense of the word. With the abolition of slavery in Burma, the slave-wife disappeared from the Burmese society, and it may now be taken as settled that Burmese Buddhist Law recognizes only the remaining two wives. A "superior wife" probably corresponds with the "Odapattakini" and a "tawpyaung" or "Apyaung-maya" with the "Chandavasini". Eating together is not Essential. The "superior wife" is sometimes called a "Let-son-za maya" meaning the wife who eats out of the same dish with her husband; but eating together in itself is not an essential of a valid marriage(n). It is merely a proof of social equality between the husband and wife. Thus, where the man ate out of the same dish with his slave-wife, the Dhammathats accorded to her the status of a "superior wife" (o). U E Maung therefore, rightly said: "Eating together being but an outward and visible sign of social equality, it was useful as a proof that a man united to a woman of lower degree raised her to his own social position by eating out of the same platter with her. But sharp social distinctions exist no longer and eating

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(n) Ma Gywe v. Ma Thi Da II.U.B.R.(1892-96) p.194.

(o) K.M.D.(II).Sec.277 & 284.

eating together has lost all its original significance (p)". Hence, eating together out of the same dish means no more than joint residence nowadays (q).

Apyaung-maya. The Manugye defined an "apyaung-maya" as a woman who openly lives with a man having a "superior wife", but who does not eat out of the same dish with him (r). It is obvious from this definition that a "tawpyaung" or an "apyaung-maya" is not a "superior wife", The term presupposes the existence of a "superior wife". It seems that a "tawpyaung" or an "apyaung-maya" can acquire the status of a "superior wife" only when the latter dies or is divorced; her husband may raise her social status by jointly residing with her, and that is possible, considering the fact that even a slave-wife could be raised to the status of a "superior wife" by the husband eating out of the same dish with her. It is submitted that the difference between a "superior wife" and a "tawpyaung" or an "apyaung-maya" lies not in the inferiority of original social standing, but of the status acquired.

An "apyaung-maya" is also known as "tawpyaung" who is one of the three kinds of wives who are entitled to inherit from their husbands. In the Rajabala, she was termed as "anujaya". In the Manu, however, she was called "anugharani" who is an

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(p) B.B.L. p.44.

(q) Ma Thein Yin v. Mg Tha Dun, 2. Ran. p.62.

(r) K.M.D.(I).Sec.16.

an "inferior wife" (ဖယ်: ငယ်) kept by the man either during or after the lifetime of his "superior wife" (s).

Six Classes of Apyaung Wives. The Dhammathats mentioned six classes of "apyaung" wives, viz:

(1) a slave wife brought by the "superior wife";
(2) a slave wife brough by the husband;
(3) a slave wife purchased by the couple during coverture;
(4) a slave wife inherited from the parents of "superior wife" during coverture;
(5) a slave wife inherited from the parents of husband during coverture, and
(6) a "tawpyaung" who is a free born woman who is not purchased,but is publicly kept by the man who does not eat out of the same dish with her (t).

How They Inherit. On the death of the husband, the six " "apyaung" wives would get what was given to them during his lifetime; the estate would be divided into seven and one-half shares, of which four would go to the "superior wife", three to the "tawpyaung", and one-half share to five other slave-wives per stirpes, provided that they were not "santaka" or heriditary slaves. If they were heriditary slaves, they were not entitled to any separate share in the estate. If

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(s) K.M.D.(I).Sec.276.

(t) Ibid. Sec.277.

If they gave birth to sons, they were released from slavery, but if daughters were born, only the daughters would gain freedom (u).

Tawpyaung is not a Concubine. It is, therefore, clear from the Dhammathats that a "tawpyaung" is entitled to inherit from her husband under certain circumstances although the "superior wife" may be still living: her child Hetthima is legitimate and also entitled to inherit from its father (v). She is not a free concubine. A Roman concubine has not the status of a wife, and her child is not legitimate but only capable of legitimation by subsequent marriage with her.

Difference between Superior and Inferior Wives. U E Maung said that the Mohavicchedani described a "tawpyaung" as an inferior wife (w) and cited the extract from the text which was reproduced in section 287 of the Kinwun Mingyi's Digest Volume I as authority for it. That is true, but it is respectfully submitted that the aforesaid section dealt with the distribution of the husband's estate between two wives of different social ranks, of different standards of intellect, industry and character. The "tawpyaung" may have the social standing of a "superior wife"; she may, perhaps, possess a higher degree of intellect, greater industry and better character than the latter. She is, therefore, inferior only in the sense that she is not treated with the same regard and

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(u) K.M.D.(I).Sec.276 & 277. (v) Ibid. Sec.16.

(w) B.B.L. p.33.

and courtesy as with a "superior wife". She may even live with the "superior wife", but that will not in itself raise her status to that of a "superior wife". The wife whom the man first married is almost invariably regarded as a "superior wife", provided that she is by character, social rank and reputation, fit to be a wife. But where she is prima facie wanting in any of the said qualities, a dispute may arise whether she is a wife or a mere concubine. There can be no question of her superior status if the man has only one woman who satisfies the test of a wife. Where a man has more wives than one, the wife first married is obviously a "superior wife" (x). She cannot be a "tawpyaung" (inferior wife) unless the man subsequently marries another woman who proves herself to be a "superior wife". It has been said that the definition of the term "tawpyaung" presupposes the existence of a "superior wife" (y). Consequently, a "tawpyaung" is but an "inferior wife". Her status is below that of a "superior wife", but evidently higher than that of a concubine or mistress who has no claim to inheritance under any circumstances. She occupies the "peculiar status of one who is not a wife in the strict sense of the English word, and yet is not a mere mistress (z)".

Proof of Status. Although the main distinction between "superior" and "inferior" wives in olden days centred around the question whether or not the husband ate with the woman

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(x) Mi Kin Gale v. Mi Kin Gyi U.B.R.(1910-13) p.42.
(y) K.M.D.(I) Sec.16.
(z) Ma Thein Yin v. Mg Tha Dun. Antep.175.

woman out of the same dish, sharp social distinctions had long passed away among Burmese Buddhists, and consequently, eating together out of the same dish no longer serves as the criterion to decide which wife is "superior" and which is "inferior". In his recently published treatise on Burmese Buddhist Law, Mr. Mootham rightly observed: "The distinction between wives in the fullest sense (or 'superior' wives) and 'inferior' wives, which is of great importance with regard to the rules of inheritance, is one of fact. Were both accorded equal and similar rights by the husband ? Were both recognized as of equal status by their neighbours? Had each an equal share in the care and management of the husband's estate ? Did the husband live indifferently with each ? Unless the answers to questions such as these is in the affirmative, the status of one of the women is not higher than that of an inferior wife (a)".

It is possible for a Buddhist man to have two wives occupying identical positions both in respect of personal and proprietary rights: in that case, both wives are "superior" wives" (b). Separate living from the husband raises a presumption that the wife living apart is not a "superior wife", but this presumption is not irrebuttable (c).

In Maung Tha Dun's case (d), May Oung,J., pertinently observed that when an inferior wife claims to inherit on the death of her husband, the proof she is required to furnish

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(a) Chapter II. p.18.
(b) Mi Me v. Mi Shwe Ma. Ante. p.168.
(c) Ma Thein Yin v. Maung Tha Dun Ante p.176.
(d) Maung Tha Dun v. Ma Thein Yin. 1.Ran. p.1 @ 4.

furnish must be more strict where she had previous knowledge of the existence of the first wife who had lived separately from, and unknown to, her.

Where a man has a wife and visits another woman with whom he never goes out into public, or associates her with his relatives or friends, it is a case of concubinage which does not entitle the woman to claim maintenance (e) or inheritance.

Share of Inferior Wives. It is now regarded as settled law that an inferior wife living with her husband is, upon the death of her husband, entitled to two-fifths of the vested share of her husband, the other three-fifths going to the superior wife (f). The share of the superior wife cannot be dwindled away by his taking as many inferior wives as to gratify his uncommon lust; if there are two or more inferior wives, they will share that two-fifths equally. And if there are two or more superior wives, they will also share that three-fifths equally.

Where an inferior wife lives separately from her husband, she is not entitled to any inheritance (g). But she is allowed to keep so much of her husband's property as passed into her possession while he was alive (h). Hence, once the status of an inferior wife is established, her right to share her husband's estate will be determined

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(e) Ma Kyin Mya v. Maung Sit Han. R.L.R.(1937).p.103 @ 107.
(f) Mi Me v. Mi Shwe Ma, Ante.p.168.
(g) Ma Than v. Ma Kyin. 3. Ran.p.656.
(h) Ma Gywe v. Ma Thi Da. Ante.p.175.

determined conclusively according as to whether or not she had lived with him during his lifetime.

Common Terms. The writer proposes to define certain common terms by which a Buddhist woman cohabiting with a man is known in modern society.

NGAI-MAYA is an honourable term to denote a wife whom a man first married in his younger days. It must not be confused with the term "maya-ngai" which is less respectable, in that although it means an inferior wife, it is frequently misapplied to a mere mistress or a concubine who has not the status of a wife. Their Lordships of the Privy Council had, therefore, struck a note of warning against indiscriminate and loose use of the term "maya" as the same word which is used to describe a woman lawfully married is applied by the Burmese to a woman living with a man on less honourable term (i).

APYAW-MAYA is a woman kept by a man simply for the sake of sexual pleasure. She is not a wife in the true sense of the word. She is a mistress or a concubine. The man never intends to give her the status of a wife. A child born of such woman is illegitimate.

EINDAUNGGYI-MAYA is the term applicable to a wife who at the time of marriage was either a widow or a divorcee. Her age is immaterial.

PWE-TET-MAYA.is an epithet for the superior wife of a Burmese official who alone was recognized by the King or officials of the State. Before the annexation, it was customary for a Burmese official to have two or more superior

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(i) Mi Me v. Mi Shwe Ma. Ante.p.168.

superior wives, but only one of them was received by the King at his palace, and she was commonly known as "pwe-tet-maya" or "pwe-win-maya" equivalent to "min-thi-soe-pauk-maya" meaning a superior wife of a respectable Burman who alone is introduced to high officials as his wife.

LET-SON-ZA-MAYA is a wife who lives and eats with her husband (j). Originally, it means the wife with whom the husband ate out of the same dish as outward symbol of social equality. As previously stated, eating out of the same dish with the husband was in early times, the sole distinction between a superior wife (maya-gyi) and an inferior wife (taw-pyaung).

MYAUKMA "(monkey wife) and "Myaukhti" (monkey husband) often mentioned in the Dhammathats are interesting to understand. At the present day, the former denotes a married woman who keeps a paramour, and the latter denotes the paramour himself who is often known as "lin-ngai". Sir John Jardine in tracing the origin of these terms, said (k):

> "Most Europeans, and even some of the younger Burman magistrates, are ignorant of the meaning of their terms "monkey-wife" and "monkey-husbands" (မျောက်မ) and (မျောက်ထီး). They relate to habits of monkeys who usually live in distinct groups, in which a male is

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(j) C.T.& P. of B.L. p.75.

(k) Notes VIII. Remarks under section 14 of translations from the Mohavicchedani.

is often united to one or more particular females, but if gone abroad or strayed away to another group, finds there sufficient considerations for his wants to have a female allotted to him, especially if he be a powerful monkey; or he will appropriate a temporary partner and take the consequence of being compelled to remain in the new tribe or of recognizing his newly acquired partner as consort or of being driven out of the community. The lower and formerly oppressed races of Burma sometimes allowed their guests to cohabit with unmarried females of their household; some females became the myaukmas during the guests' stay; and what was originally an act of hospitality was afterwards claimed as a privilege by Burman lords when absent from their families and residing temporarily in other places. In the same way, a married merchant coming from a distant place for trade may keep a woman as if she were his wife, she attending to his business and cohabiting with him only; their temporary relationship is that of myaukma and myaukhti; the woman may thus support herself as the temporary wife of

of several men in succession without sinking to the level of a courtesan. A married woman, if she cohabits in this way with a guest or visitor, also becomes a myaukma and he a myaukhti, his status being similar to that of "lin-ngai" or lesser husband. It is by enquiry into the customs of the Karens and Chins that fuller acquaintance will be made with these subjects."

RESTITUTION OF CONJUGAL RIGHTS.

We have mentioned in the Chapter on the Sources of Burmese Customary Law (a) that the Dhammathats made no express provision for a suit for restitution of conjugal rights, but the Courts in Burma have so often recognized the right to institute such a suit by either spouse that Burmese Buddhists have now come to think that it is a legal right under their customary law. It is, however, an indisputable fact that this right is more often exercised by men than by women, and the writer must confess that in his experience as a Judicial Officer for over thirteen years, he had not come across a single case in which the plaintiff was a woman.

Duties of Spouses. Marriage among Burmese Buddhists as among other nationalties, creates certain mutual rights and obligations, between the contracting parties. The Buddha, in his discourse known as the Singalovada Sutta, laid down the duties of a married couple for ~~common~~ mutual observance. He said:

> "O house-holder, in five respects a wife who is likened unto the West should be maintained by the husband; by speaking good of her; by not speaking bad of her; by not committing adultery; by allowing her to have her way (in the management of house-hold affairs), and by granting ornaments to her. O house-holder, if in these

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(a) Ante. p.30.

these five respects a wife ~~///~~ likened unto the West is maintained by the husband, the wife observes the five other respects towards her husband. She disposes well of all duties (both big and small); she treats (her servants) agreeably; she commits no adultery; she preserves acquired property; she is clever and not lazy in all her works. O house-holder, if in these five respects a wife who is like the West is maintained by the husband, the wife looks him in these five points. If the West is covered thus, he is safe and free from danger."

It is, therefore, apparent that both under the moral and the religious codes, the husband has the right of consortium with his wife, who in her turn is entitled to reasonable maintenance by her husband. Thus, it is the wife's duty to grant to her husband, the pleasures and comforts of a home life, while the husband is placed under a strict obligation to support her and the children, if any. The Dhammathats also reproduced with slight variations, the duties of husband and wife as preached by the Buddha, and in the Kyetyo Dhammathat, a wife is particularly exhorted to serve her husband to his entire satisfaction, adding that she could not gain greater merit by any other means (b)

(b) K.M.D.(II).Sec.208 to 212.

Women Always Need Protection. Again, according to the Dhammathats, a woman is supposed to live under the protection of her parents while she is small; of her husband after the marriage; and of her children and grandchildren when she becomess a widow (c). At no period of a woman's life should she live freely, or without being duly protected by one or the other class of persons mentioned above.

How Dhammathats Enforced Marital Duties. Although the Dhammathats did not specifically provide for the enforcement of marital duties by institution of a suit for restitution of conjugal rights, it is wrong to suppose that no provisions existed in them to compel a spouse to return to the other partner where there was desertion without sufficient excuse. The Manussika and Manugye Dhammathats authorized imposition of heavy fines on a deserting spouse, and the latter further provided that the said peanlty could not be waived even where the spouse at fault subsequently undertook to restitute conjugal rights with the innocent spouse (d).

The Kyannet Dhammathat provided punishment for a wife who discarded her husband because he was bad, but permitted the husband to look for another wife if his wife were not good (e).

The Dhammathats also contained provisions for dealing with a spouse who deserted the other while the latter was

(c) K.M.D.(II).Sec.236.

(d) Ibid. Sec.306.

(e) Ibid. Sec.308.

was suffering from leprosy, blindness, etc., or had become a pauper. The extract from the Vilasa Dhammathat contemplated a report being made to the King against the guilty spouse in such cases, for an order directing resumption of conjugal relationship with the innocent spouse (f). Hence, in Maung Kin v. Ma Hnin Yi (g), Jardine, J., of the Special Court rightly observed:

> "So long as the marriage bond subsists, the wife is at Buddhist Law required to do her part in contributing to the joint comfort and well-being, as shown in such texts as section 13 of the 5th Book of the Manu Kye and in other texts. Desertion of a husband seems once to have been punishable (see section 30, 6th Book, page 170)."

In the face of the said provisions found in the Dhammathats, it is submitted that it is wrong to suppose that the remedy by way of a suit for restitution of conjugal rights was not at all contemplated by the Dhammathats where one of the couple failed in his or her marital duty.

Suit for Restitution of Conjugal Rights lies in Buddhist Law. The question whether a suit for restitution of conjugal rights lies among Burmese Buddhists came up before the Special Court in Nga Nwe v. Mi Su Ma (h) as early as 1886. In

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(f) K.M.D.(I).Sec.309 & 310.

(g) S.J. p.114.

(h) Ibid.p.391.

In that case, Mac Ewen, J., held that marriage between Burmese Buddhists may be dissolved at any time by mutual consent, and where such consent is wanting, it cannot be dissolved except on some grounds recognized by the Dhammathats, and not by the mere volition of one of the parties; and consequently, so long as a marriage is not regularly dissolved in one or other of these ways, the contract subsists, and during its subsistence, a suit for restitution of conjugal rights will lie. "Surely then", said Mac Ewen, J.,"so long as the matrimonial contract subsists, the parties to it are entitled to enforce it, and where there has beennno divorce, either party is entitled to claim conjugal rights, and if denied, to sue for them."

In Mi Kin Lat v. Ba Soe(i), however, the learned Judicial Commissioner of Upper Burma held that as one of a Buddhist couple might divorce the other by mere caprice, no suit for restitution of conjugal rights would lie among Burmese Buddhists inasmuch as a decree for restitution of conjugal rights could be rendered nugatory at the will of the unsuccessful party. But the correctness of this view was challenged in Nga Chin Dat v. Mi Kin Pu (j) by Shaw, J., who rightly observed that the rules of the Dhammathats implied that the Judge's interference was invoked to compose conjugal differences and restore cohabitation, and "unless inconsistent with the Buddhist Law, a suit for restitution of conjugal

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(i) II U.B.R.(04-06) Buddhist Law. Dvn. p.3.

(j) II U.B.R.(07-09) Marriage.Restn. of Conjugal Rights. p.1.

conjugal rights naturally lies." This view was affirmed by the Rangoon High Court in Ma Thein Nwe v. Maung Kha (k) and Maung Kywe v. Ma Kyin (l): it may therefore, be taken as settled law that a suit for restitution of conjugal rights lies among Burmese Buddhists.

What Plaintiff must Prove. In Maung Sein v. Kin Thet Gyi (m), it was held that the plaintiff in such a suit must be faultless and be able to prove that the defendant is not justified in withdrawing from cohabitation, in order to succeed. Ill treatment or cruelty by the plaintiff is always a good defence to a suit of this kind although minority of the defending wife is not in itself sufficient excuse for living apart. What is tantamount to cruelty, see the Chapter on Divorce (n).

In Maung Po Han v. Ma Tha Wa (o), it was decided that a single act of cruelty by the wife's mother-in-law is not sufficient ground for refusing to return to her husband's house. But in Ma Thein Nwe v. Maung Kha (p) adultery on the part of the plaintiff was considered as a complete defence to such a suit. The decision in a suit for restitution of conjugal rights is not a judgment in rem (q).

(k) 7. Ran. p.451.

(l) 8. Ran. p.411.

(m) II.U.B.R.(1904-06) Marriage p.5.

(n) Infra. p. 256 at 264

(o) 39 I.C. p.114.

(p) Supra.

(q) Maung Po Khin & others v. Ma Shin & others. 11.Ran. p.198

How Decree is Enforced. A decree for restitution of conjugal rights is of the nature of a decree for specific performance and as such, is entirely discretionary with the Court. Under Order XXI Rule 32 of the Code of Civil Procedure 1908 it may be enforced by detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both, if he has had wilfully failed to obey it. But no woman can be imprisoned in execution of such a decree (r). Where an attachment of properties has remained in force for one year and the judgment-debtor has not obeyed the decree, the attached properties may be sold by order of the Court on application made by the decree-holder, and out of the proceeds, the Court may award to the decree-holder such compensation as it thinks fit and shall pay the balance if any, to the judgment-debtor on his or her application. Where the judgment-debtor has obeyed the decree and paid all costs of executing it which he or she is bound to pay, or where at the end of one year from the date of the attachment, the decree-holder has failed to apply to the Court for sale of the attached properties, or if made, has been refused, the attachment shall cease.

Under Order XXI Rule 33 of the Code of Civil Procedure, 1908, notwithstanding anything contained in Rule 32 aforesaid, the Court may order that decree for restitution of conjugal rights shall not be executed by detention of the Judgment-debtor in prison, either at the time of passing it or at any time

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(r) Order XXI R.32.C.P.C.

time afterwards. Where such an order is made and the decree-holder is the wife, the Court may order that in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments. Such an order may be varied or modified from time to time by the Court, either by altering the time of payment or by increasing or diminishing the amount, or it may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part, as it may deem just. Any money ordered to be paid under this rule is recoverable as though it were a decree for the payment of money, by detention in civil prison of the judgment-debtor, or by the attachment and sale of his property or by both, under Order XXI Rule 30 of the Code of Civil Procedure, 1908.

Automatic Dissolution versus Restitution of Conjugal Rights.

According to earlier decisions, divorce on mere caprice was foreign to Burmese Buddhist Law, but in more recent cases(s), it was held that the marriage between a Burmese Buddhist couple is automatically dissolved at the end of three years' desertion by the husband, or one year's desertion by the wife, if there were no communication between the couple and no contribution towards the maintenance of the female spouse within the respective periods aforesaid. It is respectfully

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(s) Ma Nyun v. Maung San Thein, 5.Ran.p.537. F.B.
S.A.S. Chettyar Firm v. U Maung Gyi. 14.Ran.329.

respectfully submitted that the recognition of the right to sue for restitution of conjugal rights is inconsistent with the principle of automatic dissolution of the marriage on the lapse of prescribed periods of desertion.

As the Law now stands, it appears that a decree for restitution of conjugal rights may be rendered nugatory by the wife staying away from her husband for one complete year from the date of separation, and her refusing any maintenance from him during that period. Such a decree passed against the husband will become worthless if he can stay away from his wife for three complete years from the date of separation and neglect to maintain her during that period.

No doubt, it is possible for a wife to execute such a decree against her husband by attachment of his property or by his detention in the civil prison or by both as provided by Order XXI Rule 32 of the Code of Civil Procedure. She may, if she wants, apply to the Court for periodical payments under Order XXI Rule 33 of the Code as mentioned above, but the evil effect of automatic dissolution of marriage cannot be avoided unless the husband who is the judgment-debtor, is well-to-do and can be ordered to make periodical payments for her subsistence to keep alive the status of husband and wife between them. However, it has been stated that a woman plaintiff in such a suit is difficult to find among Burmese Buddhists, and the plaintiffs in almost 100 per cent of the cases are likely to be men. Consequently, the rights of a woman in execution of such a decree are only as good as they

they did not exist. Where the husband is the decree-holder, he can only enforce the decree by attachment of the judgment-debtor's property, but then he must wait for atleast one year before he can move the Court to order sale of the attached property, and by the time the Court passes the order for sale, the period of desertion by the judgment-debtor must necessarily have exceeded one year limit and the marriage must have been automatically dissolved by lapse of time. In the circumstances, the remedy provided by Order XXI Rule 32 of the Code of Civil Procedure,1908 is worthless if the decree-holder were a man who is governed by Burmese Buddhist Law.

It seems that a suit for restitution of conjugal rights instituted by the husband is bound to be dismissed if the wife can protract the hearing of the case for over one year from the date of actual desertion. Hence, the writer agrees with U E Maung's dictum (s): "The statement that a decree ordering a wife to resume cohabitation with her husband which the wife could counter at will by dissolving the marriage contract would, of course, be a mere 'brutum fulmen' is applicable with no abated force to a decree which the party bound thereunder can render nugatory by contumacy."

Decree Does Not determine Maintenance Order. At one time, it was supposed that if after the passing of a maintenance order under section 488 of the Code of Criminal Procedure by a Criminal Court, the husband succeeds in getting a decree for restitution of conjugal rights against the wife, and she

(s) B.B.L. p.112.

she still continues to live apart, she loses the benefit of the maintenance order, in that a decree of a Civil Court determines the order of a Criminal Court, as laid down in Maung Pan Aung v. Ma Hmwe Bon (t), and Maung Tha U v. Ma Mya Kin (u). This, however, is no longer good law in view of the decision in Maung Dun v. Ma Sein (v) to the effect that the magistrate is not necessarily bound to adopt the order of the Civil Court, but must consider it along with other circumstances which may be placed before him when he is called upon to adjudicate whether the maintenance order should cease or not. In Maung Po Kwe v. Ma Pwa Shein (w), the husband brought a suit for restitution of conjugal rights against his wife who had previously obtained a maintenance order under section 488 Criminal Procedure Code, 1908. The Court ordered a decree, subject to the condition that the husband should provide a separate accommodation for the wife. The husband did not comply with the condition of the decree. It was held that the magistrate was justified in exercising his discretion under section 489(2) Criminal Procedure Code, 1908, in refusing to cancel the order of maintenance.

For the reaons given above, the writer is of the opinion that there is sufficient reason for reviewing the decisions which have given recognition to the automatic dissolution.

(t) 1.B.L.T. p.104.
(u) 9.B.L.T. p.162.
(v) 3.Ran. p.150.
(w) R.L.R.(1939) p.741.

dissolution.of a Burmese Buddhist marriage on the expiry of prescribed periods, as a principle of Buddhist Law. There is yet no definite decision of the Judicial Committee of the Privy Council on the point, and it is very doubtful whether such principle of law, even if it were recognized by the Dhammathats at one time, is acceptable by modern Burmese Buddhist society. This matter will receive fuller treatment in the Chapter on Divorce (x).

(x) Infra p. 256

MARRIAGE WITH FOREIGNERS.

It is clear that there are no separate provisions in the Dhammathats to deal with this subject. "Under the Burmese regime, all persons, whatsoever their race or creed, were governed by the Dhammathats, and since by international law, marriage is decided by the law of the place where it is celebrated, it follows that legal marriages according to Burman Buddhist custom could have been contracted in Burma, before the annexation, between Buddhists and adherents of other religions; and if the marriage was valid when contracted, it cannot have become invalid by any subsequent change of law, unless there had been a statutory provision invalidating such marriage (a)".

In Ma Chein and two others v. Ma Mo (b), a Burman Roman Catholic lived with a Buddhist woman as man and wife, long before the British annexation of Upper Burma. Both parties were the subjects of the Burmese King. Thirkell White, J.C., held that the Buddhist Law of marriage applied to them as the lex loci contractus; that there was a presumption in favour of the fact of a marriage having been contracted between persons who had lived together and professed to be man and wife for a number of years, and the burden of proving the invalidity of a marriage in the circumstances is on the party who impeached or questioned its validity. The learned Judicial Commissioner in arriving at the decision, relied upon the Stories' Commentaries on the Conflict of Laws (c) in which occurred the following

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(a) U May Oung's L.C. on B.L. p.10.
(b) Chan Toon's L.C. (II). p.224.
(c) Eigth Edition at page 187.

following passage:

> "The general principle certainly is, as we have already seen, that between persons sui juris, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is equally invalid everywhere."

The writer is not aware of any local law which invalidates marriages which when contracted were valid: consequently, it may be taken as settled law that Burmese Buddhist Law is applicable to marriages between Buddhist women and non-Buddhist men as the lex loci contractus, if they were contracted before the annexation of Burma. But in Sophia Blin v. Maria David (d), it was held by the Chief Court of Lower Burma that Burmese Buddhist Law did not apply to marriages of non-Burmans non-Buddhists celebrated in Burma during the Burmese Regime. It is necessary to state briefly in this thesis, the law applicable to mixed marriages now-a-days, as laid down by the Courts from time to time as occasions arose.

Marriage with Mahomedans. It is now settled law that Mahomedans can contract valid marriages with kitabis. By kitabis are meant only those persons "who believe in a heavenly or revealed religion, and have a kitab or book that has come down to them, such as the Book of Abraham or Seth, and the Psalms of David (e)".

(d) 12. B.L.T. p.48.

(e) Tagore's Lectures (1873) p.305.

It is also said that "it is unlawful for a kitabi to marry a pagan woman or an idolatress before she becomes a Mussalman (f)". In Queen Empress v. Nga Pale (g) it was held that a Buddhist cannot be said to have a heavenly or revealed religion and a kitab or book of recognized authority which would place them on the same footing as Jews and Christians and other religionists believing in one God. Consequently, no legal marriage can be contracted between a Mahomedan and a Buddhist woman unless the latter professes Mahomedanism and the ceremony is performed in accordance with the Mahomedan rites.* The converse holds good. In Ma Le v. Maung Kye and another (h), this problem was considered, and Thirkell White, J.C. observed: "The prohibition of marriage between a Mahomedan woman and a man of different religion appears to be even stronger than that of a marriage between a Muslim and a non-Muslim female. For, the prohibition is absolute, and extends even to unions with Christians and Jews."

The leading case on the subject of mixed alliances between Buddhists and Mahomedans is that of Abdul Razak v. Sha Mahomed Jaffer Bindarin (i) wherein their Lordships of the Privy Council appear to have considered it as settled law that a Mahomedan cannot lawfully marry a Buddhist woman unless the woman apostatizes and embraces Islam. Sincerity of conversion is immaterial. Profession

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(f) Tagore's Lectures (1873) p.314.
(g) P.J. p.607.
(h) II. U.B.R. (1897-01) p.497.
(i) 21, Calcutta. p.666 P.C.

* But see The Buddhist Women's Special Marriage and Succession Act (XXIV of 1939) in Appendix D.

Profession with or without conversion is necessary and sufficient to remove the disability, in that no Court can test or gauge the sincerity of one's religious belief.

In Ma Saing v. Kadder Moideen (j), Sona Ullah v. Ma Kin (k) and Ebrahim v. Fatima Bibi(l), it was decided that a Mahomedan marriage is ipso facto dissolved on apostacy by either spouse, and in Hussein Unwar v. Fatima Bee (m) the suit for restitution of conjugal rights by a Mahomedan husband was dismissed on the score that the defendant had committed apostacy, and that the utterance of words against Mahomedan faith or any oral act of faith in any religion other than Mahomedanism constitutes apostacy. Hence, U Chan Toon said: "It does certainly appear anomalous that a party to a contract should, at will, be able to throw off an obligation by a declaration of a change in belief (n)".

Marriage with Hindus. Except under the provisions of the Special Marriage (Amendment) Act (XXX of 1923), there cannot be a valid marriage between a Hindu of any caste and a Buddhist. Before the said Act came into force, it was held in Badein Singh v. Ma Me (o) that a Hindu could only marry a Hindu woman of his own caste, and that so long as he remained a Hindu, he could not marry a Buddhist girl. But in S.Anamalai Pillay v. Po Lan (p), it was decided that a Hindu of the

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(j) 8.B.L.R. p.16.
(k) 9.L.B.R. p.206.
(l) R.L.R.(1939) p.393.
(m) S.J. p.368.
(n) Principles of B.L. p.38.
(o) 6. B.L.R. p.253.
(p) 3.L.B.R. p.228.

the Punchama or Pariah class can, in the absence of proof to the contrary, contract a valid marriage with a Buddhist.

Marriage with Christians. There can be a valid marriage between a Christian and a Buddhist if the provisions of section 5 of the Christian Marriage Act (XV of 1872) are complied with. Previous to 1927, where the marriage had taken place under section 5, no divorce suit could be maintained at the instance of the Buddhist spouse, as section 2 of the Divorce Act (IV of 1869) as it then stood, did not authorize any Court to grant any relief under the Act except in cases where the petitioner professed the Christian religion and resided in India at the time of presenting the petitions. That was the decision in Kin Twe U v. C. Ripley (q) wherein Burgess, J.C., observed: "It is apparently an anomaly that one of the parties to a marriage - in this instance, the husband - should be entitled to relief under the Divorce Act, because he professes the Christian religion, and that the other - in this instance the wife - should be debarred from such relief, because she does not profess that religion, although she was allowed to marry under the Christian Marriage Act, notwithstanding such difference in religion, and it has not unnaturally been argued that such a state of the law could never have been contemplated by the legislature." Fortunately however, this absurdity has been removed by section 2 of the Divorce (Second Amendment) Act (XXX of 1927); it is now possible to obtain a divorce under the Act where either the petitioner or the respondent professes the Christian religion.

(q) C.T.L.C.(II). p.32.

In Maung Kyaik v. Ma Gyi (r), a Burmese Buddhist became a convert to Christianity and married a Christian in a valid way. He then reverted to Buddhism and contracted a second marriage with a Buddhist woman. It was held that the second marriage was invalid, as apostacy did not ipso facto dissolve a Christian marriage. But in Lily Rose Chen Gwan v. Cheng Gwan (s), both parties were Christians at the time of the marriage. The husband, subsequently, abandoned the Christian faith and the wife sued for divorce under the Divorce Act, 1869. The suit was decreed. In Ma E Tha v. Ma Thein Kin (t), the couple were married according to Burmese Buddhist rites. The husband subsequently, embraced Christianity, but the Rangoon High Court held that the Buddhist marriage was not automatically dissolved by apostacy of either spouse, as in the case of Mahomedans.

Marriage with Chinese. This matter has been more or less completely dealt with in the Chapter on the extent of application of Burmese Customary Law (u). It is now settled law that a Chinese Buddhist is a "Buddhist" within the meaning of section 13 of the Burma Laws Act (XIII of 1898) and consequently, the marriage of a Burmese Buddhist woman with a Chinese Buddhist man is now governed by Burmese Buddhist Law (v). Likewise, Burmese Buddhist Law is held applicable to a marriage of Burmese Buddhist woman with a Chinese Confucian, by virtue of sub-section 3 of section 13 of the Burma Law Act, 1898, in Ma Kyin Mya v. Maung Sit Han (w). It is submitted that both

(r) II.U.B.R.(1897-01) p.488.
(s) 3.B.L.R.p.1.
(t) A.I.R.1935 Ranp,37 & 39.
(u) See Chapter IV. p.13
(v) Tan Ma Shwe Zin & others v. Koo Soo Chong & others. R.L.R.(1939) p.548 P.C.
(w) R.L.R.(1939)p.103.

both these decisions are correct, and are in keeping with the provisions of the aforesaid Act.

From what has been said above, it will be seen that as a general rule, the personal law of non-Buddhist man determines the validity of his marriage with a Buddhist woman. That is certainly, as unreasonable as it is unjust. The Buddhist woman, after cohabiting with a non-Buddhist man for several years as man and wife, finally discovers that she is a mistress and not a wife, and her children born of the seeming wedlock, bastards. How can this state of affairs be tolerated ? Why should not the personal law of the woman determine the validity of such union ? Why should such hardships be allowed to prevail in modern society ? It cannot be over-stressed that one of the first duties which a civilized government should address itself, is to place its marriage laws on a sure and satisfactory footing. The honour and happiness of this and future generations as also the moral and well-being of society greatly depend upon the marriage laws of the country. A marriage law which creates a doubtful and unsatisfactory situation is evidently a source of mischief. It will throw society into confusion, make property insecure, cover families with grief and despair, make the innocent suffer for the blunders of others, and otherwise, create hardships pregnant with uncertainties. No doubt can be allowed to exist on a question of such importance as the validity of marriages and the legitimacy of children.

Marriages with Non-Buddhists are now Possible. The Special Marriage Act,(III of 1872) is the first step taken by the legislature to give the status of a wife to a Buddhist woman who chooses to marry a Hindu, Jain or Sikh, without abandoning her Buddhist faith. The Christian Marriage Act, (XV of 1872) likewise, confers such status upon a Buddhist woman marrying a Christian, but succession to the estate of the couple marrying under the provisions of the said Acts is governed by the Succession Act, (X of 1865) and not by the personal law of the Buddhist wife, and they cannot adopt children.

The local legislature, however, has recently passed the Buddhist Women's Special Marriage and Succession Act,(XXIV of 1939) which came into force on the 1st day of April 1940. Under the provisions of this Act, a Buddhist woman can now contract a valid marriage with any non-Buddhist, without abandoning the Buddhist faith, and succession to the estate of a couple marrying thereunder, will be regulated by Burmese Buddhist Law. How far this legislative enactment is workable, it is too premature to judge; it is, moreover, beyond the scope of this study to comment on its provisions. But it is respectfully submitted that the law as it stands appears to be highly imperfect and is bound to create anomalous positions, especially where a non-Buddhist husband who married under the Act has subsisting valid marriages under his personal law and has children by such marriages. There is bound to be a conflict of laws if Burmese Buddhist Law were to apply to the succession of his estate as is made compulsory under section

section 26 of the Act. Time alone will judge how far the object of the enactment is achieved and to what extent its provisions are workable. That it directly interferes with the personal laws of non-Buddhists or curtails certain rights and previleges vested in them thereunder, is apparent. For instance, it legalises a union between a Buddhist woman and a Mahomedan, although under the Koranic laws, he cannot contract a valid marriage with a non-Kitabi. That was why the Indian legislature made no provisions for the marriage of a Mahomedan with a Buddhist woman under the Special Marriage Act, 1872 and the (Amendment) Act, 1923. Moreover, a non-Buddhist husband whose personal law allows him to make a will or create a religious trust (Wakf) will lose such invaluable rights and privileges which are foreign to Burmese Buddhist Law. It must, however, be remembered that the Buddhist Women's Special Marriage and Succession Act, 1939 is applicable only to women belonging to any of the indigenous races of Burma, who profess the Buddhist faith. For ready reference, the Act is reproduced in Appendix.D.

The only Genuine Solution. In the opinion of the writer, the only genuine solution of the difficult problems that arise from mixed alliances lies not in any legislative enactments, but in the Buddhist women themselves. If they stop marrying non-Buddhists, the purity of the Burmese race will be maintained and no difficult questions such as the validity of marriage, legitimacy arise. It may be contended that such suggestion

marriage, legitimacy of children, succession and inheritance can arise. It may be contended that such a suggestion is impracticable, but there is no reason why the object cannot be achieved sooner or later by educating public opinion. The Buddhist women should be convinced that grave dangers lie ahead of them and future generations if they continue to marry foreigners indiscriminately. It is only the avoidance of mixed unions that will completely redeem the Buddhist women from their present untoward and deplorable position.

CHAPTER XIX.

M A I N T E N A N C E .

"Marriage, whatever the form of the contract may be, constitutes, if not an express, at all events an implied contract between the parties that the husband shall maintain his wife. In Christian countries, a breach of this contract cannot be enforced by the wife in a Civil Court directly against the husband, because the law considers a man and his wife as one person, and will not permit an action by the wife against her husband; but no such principle is known to the Mahomedan, Hindoo, or Parsee law; and the Supreme Courts at Calcutta and here have always treated native married women as femmes sole , and indeed, it is quite impossible, upon any a priori or natural reasoning to treat them as anything else(a)*". This observation of Jackson,J., of the Bombay Supreme Court applies with equal force to similar actions under Burmese Customary Law.

The right of a Buddhist wife to maintenance as against her husband is not merely contractual in nature. It is an incident under the Customary Law, of the status or estate of matrimony. Both under the moral and religious Codes (b) and also the Dhammathats(c), the husband is under an obligation to maintain his wife, and to provide her with suitable clothes and ornaments. Even in sanctioning polygamy, the Dhammathats were careful to lay down that only he who could by his own skill and labour provide maintenance should have more wives than one(d).

(a) Ardaseer Cursetjee v. Perozeboye (1856) 6. Moo. I.A. p. 348 @ 372-373.
(b) The Mingala Sutta. (c) K.M.D (II). Sec. 208 and 236.
(d) K.M.D (II). Sec. 253.

* Dunkley,J., inadvertently quoted this passage as the dictum of the Privy Council, in Ma Saw Nwe v. U Aung Soe. A.L.R. (1939). p. 527.

The Dhammathats required the husband to make provisions for the maintenance of his wife and children, before going away on a journey to acquire property and knowledge, to fight in the battle,or to perform works of merit(e). They also contained provisions imposing obligations on the husband to maintain his wife who meets with a reverse of fortune, or who is physically incapacitated due to blindness, lameness,leprosy, insanity or similar diseases(f). According to the Manussika, " for a husband, the maintenance of his wife and placing her in entire charge of the whole of his property is a great merit(g) ". It is,therefore, obvious that there is a positive duty imposed upon the husband to maintain his wife or wives under Burmese Buddhist Law, and where by law, a person is under a duty towards another person, there is vested in that other,a corresponding right to have that duty performed. For, their Lordships of the Privy Council had said: "If the law which regulates the relations of the parties gives to one of them a right and that right be denied,the denial is a wrong; and unless the contrary be shown by authority,or by strong arguments, it must be presumed that for that wrong, there must be a remedy in a Court of Justice(h) ".

Hence, in ancient days, desertion by either spouse accompanied by failure to provide maintenance for the other without sufficient cause was punishable under Burmese Customary Law as a crime, and according to the Manussika, a fine of rupees six hundred could be imposed on the guilty spouse,whereas,under the Manugye, that penalty could not be remitted even if the guilty

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(e) K.M.D (II). Sec. 244. (g) K.M.D.(II) Sec. 212.
(f) Ibid. Sec.310. & Manugye V. Sec.18.
(h) Moonshee Buzloor Ruheem v.Shumsoon-nissa Begum(1867).11.Moo. I. A. p.551 @ 606.

guilty spouse subsequently undertook to provide maintenance for the other(i).

The right of a Buddhist wife to maintenance as against her husband was recognized by their Lordships of the Privy Council as early as 1884 in Maung Hmun Taw v. Ma Pwa (j) in which occurred this dictum: " It is the duty of the husband to provide maintenance for his wife, and to furnish her with suitable clothes and ornaments. If he fails to do so, he is liable to pay debts contracted by her for necessaries; but it appears to their Lordships that the law would not be applicable where she has sufficient means of her own ". That suit was for past maintenance and the decision therein was referred to by the Special Court of Lower Burma in Ko Ong v. Ma Yon (k) which also was a suit of like nature. Agnew,J., then decided that no such suit would lie where the wife had maintained herself with her own means*.

In Ma Saw Kwe v. U Aung Soe(l), the issue was whether a suit for future maintenance lies under Burmese Buddhist Law. Dunkley,J., discussed the texts of the Dhammathats dealing with the right of the Buddhist wife to maintenance as against her husband and refuted the contention of the learned counsel for the defendant that to allow such an action would be tantamount to allowing the wife to sue for her own property which is in her possession through her husband, and eventually held that

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(i) K.M.D (II) .Sec. 306.
(j) S.J. p.258.
(k) P.J. p.31.
(l) R.L.R.(1939) p.527.
* Cf. A suit for arrears of maintenance is maintainnble under Hindu Law. Ekradeswari v. Homeswar. 56.I.A. p. 182. P.C.

that a suit for future maintenance by a Buddhist wife is maintainable against her husband who is living separately from her;that such a suit is of civil nature within section 9 of the Code of Civil Procedure(Act V of 1908), and that she can claim maintenance from the date of institution of the suit for so long as the marriage between them subsists, or for so long as they continue to live separately, but not arrears of maintenance before such date.

Amount to be awarded. No fixed rule can be laid down as to the amount of maintenance which the wife is to have; each case must be judged according to the nature of its circumstances. The sum awarded should enable the claimant to live consistently with her position as the wife of the defendant, with the same degree of comfort and reasonable luxury as she had in her husband's home, unless there are circumstances which affected one way or the other, her mode of living there. The amount depends " upon the gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the conditions and necessities and rights of the members on a reasonable view of the change of circumstances possibly required in future, regard being of course,had to the scale and mode of living and to the age,habits, wants and class of life of the parties(m)".

In the writer's view, the income of the husband from all sources should be calculated, and the wife should ordinarily be awarded a sum not exceeding one-third thereof in any case, applying the rule of Nissaya and Nissita*.

(m) Ekradeswari v. Homeswar. Ante. p. 210.

* Infra. p. 244

In Ma Saw Nwe's case, his Lordship did not lay down any principle for assessing the amount of maintenance, inasmuch as the parties had agreed on the sum to be awarded if the suit was held to be maintainable.*

Court may Vary the Award. Can the amount be varied once it is fixed by a decree, and if so under what circumstances? It may be contended that a decree cannot be varied or set aside except on ground of fraud. But in the writer's opinion, the Court can vary the sum fixed by the decree, by bringing a separate suit on ground of altered circumstances. That is so under Hindu Law, but a separate suit is not necessary where there is a clause in the decree which leaves the parties at liberty to apply for variation in the execution proceedings(n). In Ekradeswari v. Homeswar (o), their Lordships of the Privy Council observed that there should be a clause of the nature suggested above in every decree for maintenance. It is, therefore, submitted that the same anology should apply to suits for maintenance instituted under Burmese Buddhist Law, on grounds of justice and equity, unless the agreement between the parties contained an undertaking to adhere to the specific rate for all time, as held by the Madras High Court under Hindu Law, in Chinnammal v. Venkataswami(p).

Court Fee payable. In a suit for maintenance, Court Fee is payable ad volorem on ten times the amount claimed for one year(q)

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* Cf. Under Hindu Law, a wife deserted by the husband without reasonable cause is entitled to recover one-third of the husband's property for her maintenance.-Ramabai v.Trimbak. 9.Bom.H.C.p.283.

(n) Rammal v.Kundan. 26. Bom. p.707.
(o) Ante p. 210. (p) A.I.R. (Madras) (1927) p.705.
(q) Ma Me v. Maung Aung Gyi. 7. B.L.R. p.220.

Assignment of Future Maintenance. Can the right to future maintenance be assigned or attached in execution of a decree? The Transfer of Property (Amendment), Act XX of 1929 has now amended section 6(d) of the Act by adding a clause (dd) providing that " a right to future maintenance in whatsoever manner arising, secured, or determined, cannot be transferred". This amendment will not affect any transfer made prior to the 1st. April, 1930 when the Amendment Act came into force. But it is submitted that the right to arrears of maintenance can be assigned or attached in execution of a decree like any other property as in Hindu Law(r).

Whether the Suit lies where Wife has Sufficient Means. In Maung Hmun Taw's case(s), their Lordships of the Privy Council had observed obiter that it appeared to them that a suit for maintenance would not lie where the wife has sufficient means of her own. U May Oung shared the doubt so expressed, and although this point seems to have been argued in Ma Saw Nwe's case(t), his Lordship declined to decide it as it was not alleged in the pleadings that the plaintiff had such means. The Dhammathats made no separate provisions for poor and well-to-do wives, nor did they say specifically that only needy wives should get maintenance from their husbands. The obligation to maintain a wife is an incident of marriage, and she has every right to expect support from him whether or not she has sufficient means of her own. In the circumstances, it is respectfully submitted that a suit for future maintenance will lie at the

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(r) Haridas v. Baroda. 27. Cal. p.38.
(s) Ante p.210.
(t) Ante p.210.

the instance of the wife, irrespective of her means to maintain herself*.

When Maintenance can be Claimed. The wife may live separately from her husband and sue for maintenance for any of the following reasons:

(1) desertion by the husband(u);

(2) cruelty by the husband, which may be either physical or legal (v); and

(3) taking a second wife by the husband in the absence of justifiable cause(w), or without the consent of the superior wife(x).

Unless otherwise specified expressly in the decree for maintenance, it remains in full force until the death of either party, or the dissolution of the marriage, or the reunion between the parties whichever occurs first.

Wife's Obligation to Maintain Husband. Is the wife under an obligation to maintain her husband under Burmese Customary Law?

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* Cf. Under Mahomedan law, the husband is bound to maintain his wife irrespective of her private means." Even where she is a rich woman and he a poor man, she is absolutely entitled, if she chooses to be provided at his expense, on a scale suitable to his means, with food, clothing, housing, toilet necessaries, medicine, doctor's and surgeon's fees, and baths, and also the necessary servants, atleast where the wife is of a social position which does not permit her to dispense with these, or in sickness. The wife need not spend a penny of her own money on these objects ". - Muhammadan Law by Dr. Fitzgerald(1931 Edition) p.95.

(x) Note also that a Hindu widow is entitled to arrears of maintenance from the date of her leaving her husband's residence although she does not prove that she has incurred debts for maintaining herself.- Ekradeswari v. Homeswar. Ante p.210.

(u) See infra. p.274 (w) Infra. p.258 Also foot-note (i) at p. 170.

(v) Infra. p.264 (x) Ma Thein Nwe v. Maung Kha.7.Ran. p.451.

This question has never been raised before, but that does not mean that no provisions ~~were made~~ exist in the Dhammathats from which such an obligation may be inferred. Complementary to section 310 of the Kinwun Mingyi's Digest,Volume II, is section 309 thereof which casts an obligation on a wife to maintain her husband who meets with a reverse of fortune,or is physically or otherwise disabled by reason of certain diseases from which he is suffering. According to the texts from the Vilasa, Dhammathatkyaw,Vannana, Rasi, Panam and Kyetyo, the deserted husband could even sell his wife to slavery and utilise the proceeds for his maintenance. Moreover,both sections 306 and 309 of the Digest contemplated imposition of penalties on the deserting wife, especially in times of her husband's distress. In the circumstances, it is respectfully submitted that the duty to maintain is reciprocal between husband and wife, so long as the marriage subsists, and consequently, the husband may sue his wife for maintenance if she abandons him without sufficient cause. Such a suit will however, be most rare among the Buddhists, but that should not be considered as a valid ground for denying him that right, and it is possible that the Courts will decree a maintenance suit of this kind especially where the wife who owns valuable separate properties deserts her needy husband. The equity of such claim will become more obvious when we consider the question of automatic divorce between husband and wife as the result of desertion by either of them followed by neglect or refusal to maintain the wife by her husband during the prescribed periods of one year and

three years, when the deserting spouse is the wife or husband, respectively(y).

Statutory Obligation. Apart from Burmese Customary Law, the husband is under a statutory obligation to maintain his wife or wives, and his legitimate and illegitimate children who are unable to maintain themselves, under section 488 of the Code of Criminal Procedure (Act V of 1898). A competent Magistrate may award a sum not exceeding one hundred rupees per mensem for each claimant thereunder, payable if so ordered from the date of application. Such an order may be enforced against the husband or the father as the case may be, by attachment of his properties or arrest and imprisonment. It is not obligatory that the order shall be enforced in the district in which the person directed to pay lives(z). Ordinarily, no warrant can be issued for the recovery of arrears of maintenance unless the application is made within one year from the date on which they became due, but it was held by Mosley,J., in U Hpay Latt v. Ma Po Byu(z) that the proviso to section 488(3) is intended to prevent a person entitled to maintenance from being negligent and allowing arrears to accumulate, but it is not intended for the benefit of the person who evades payment by avoiding service of process. In Maung Tin v. Ma Hmin(a), a Full Bench of the Rangoon High Court held inter alia that an order refusing to enforce a maintenance order in respect of arrears of maintenance for one period does not operate as a bar to a subsequent application to enforce the order for arrears of maintenance that

(y) See infra, p. 273. (z) 13. Ran. p.289.
(a) 11. Ran. p.226 F.B.

that have accrued during a different and a later period.

A husband cannot contract himself out of his statutory liability to maintain his legally married wife and children(b) and considering that a minor who is physically competent can contract a valid marriage under Burmese Buddhist Law, it is obvious that he cannot claim exemption from the normal obligation of a husband on ground of minority.

A person who has undergone a sentence of imprisonment on account of his failure to pay certain arrears of maintenance cannot be sentenced to imprisonment a second time for default in respect of the same identical arrears(c).Nor can a person be sentenced to more than one month's simple imprisonment at any one time(d).In Tokee Bibee v. Abdool Khan (e),it was held that interim protection under the old Insolvency Act could be granted by an order which could be made to apply to all debts and liabilities mentioned in the schedule including money due under an order of maintenance. But the correctness of that decision was doubted in Mariam Bi Bi v. A.E.Motala(f) by the Rangoon High Court though no definite decision was given on the point.

Wife not Entitled to Maintenance. A wife living in adultery is not entitled to maintenance under section 488 of the Code of Criminal Procedure.The words "living in adultery " in section 488(5) of the Code of Criminal Procedure point to a continuous course of conduct, and not to isolated acts of immorality. A woman who has obtained an order of maintenance

(b)Ma Gyi v. Maung Pe ,1.L.B.R.p.126.
(c)Maung Kyi Pa v.Ma Htu In; 10.Ran.p.176. (e) 5.Calcutta p.536.
(d)Zaw Ta v.King Emperor. 7.L.B.R.p.351. (f) 10.Ran.p.71 @ 73.

maintenance against her husband does not lose the benefit of it by proof of one or two laches on her part(g).

A wife who refuses to live with her husband without sufficient excuse, or who is living separately from her husband by mutual consent are also not entitled to claim maintenance under section 488 of the Code of Criminal Procedure. The fact that the wife is rich and can, therefore, maintain herself is no defence to a claim for maintenance under this section(h). Maintenance of Child. So long as the child is unable to maintain itself, the father must maintain it whether it is legitimate or illegitimate. But an adopted child is not entitled to claim maintenance under section 488 of the Code of Criminal Procedure from its adoptive father(i).

In Baran Shanta v. Ma Chan Tha May(j), it was held that the words " unable to maintain itself " in section 488 of the said Code, mean inability to earn a complete living such as an adult person might earn, without dependency on any other person; that a father being bound to maintain his child who is under the age of majority, in fixing the sum payable, the Court should pay no regard to the fact that the child is able to contribute towards its support by means of its own labour or work of any kind; that it would be contrary to public policy to encourage child labour by holding that a boy of eleven years should contribute towards his own support when he should be in school, and that a man is bound to feed and clothe his minor off-spring, and he cannot be heard to say that the latter

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(g) Ma Mya Khin v. Godenho. R.L.R.(1937) p.86.
(h) Mi Thein v. Nga Po Nyun. 7.B.L.T. p.34.
(i) Ma E Mya v. U Ko Ko Gyi. A.I.R. Rangoon (1937) p.370.
(j) 2. Ran. p.682.

latter should help him to fulfil his obligation.

Until recently, it was supposed that maintenance did not include school fees for the child.But in Maung Shwe Ba v. Ma Thein Nya (k), Mackney,J., held that the term "maintenance" includes the minimum amount of education for a child which the conventions of the country call for, and that in the present state of society,the mere maintenance of the body is not sufficient; provision has to be made for the child's developing mind and conscience.

Where the father had made over certain property to the mother in consideration of her agreement to maintain the child, an order for maintenance was rightly refused when the property ~~still~~ existed (at the time of making the application) and furnished sufficient means for the support of the child(l). But inasmuch as the father has a continuing obligation to maintain his child,the payment of a lump sum to the mother on some previous occasion is not a sufficient answer to a maintenance application on behalf of the child(m). The father is not released from the statutory obligation to maintain the child by the fact that its mother refuses to live with him(n).The obligation continues even if its mother be divorced(o). But it is open to the father to apply to a competent Civil Court for the custody of the child if he desires to avoid this liability(p).

Where maintenance is claimed for a child, its paternity

(k) R.L.R.(1938) p.673.
(l) Maung Mya v. Ma Bok Son . I. U.B.R.(1897-01) p.108.
(m) Ma Hnin Byu v. Maung Myat Pu. 1.L.B.R. p.189.
(n) Maung San Hla v. Ma On Bwin . 2.L.B.R. p.46. F.B.
(o) Maung Lu Gyi v. Mi Shwe Me. S.J. p. 362.
(p) Maung San Pe v. Ma Lai Mai. 10. Ran.p.486.

paternity must be established. Under section 112 of the Evidence Act (I of 1872),the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution,the mother remaining unmarried, shall be conclusive proof of his legitimacy, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. In Nga Tun E v. Mi Chon(q), it was held that the presumption created by section 112 of the Evidence Act is not rebutted unless it is proved that there has been no opportunity for sexual intercourse between the husband and wife at any time when the child could have been begotten; that if the husband has had access, adultery on the wife's part will not justify a finding that another man was the father, and that a question of paternity under section 488 of the Code of Criminal Procedure is governed by section 112 of the Evidence Act and not by Burmese Buddhist Law.

Alteration of Maintenance Allowance. On proof of a change in the circumstances of any person paying or receiving an allowance under section 488 of the Code of Criminal Procedure, the Magistrate may either reduce or increase it as he deems fit under section 489 of the said Code. Advance in age of a child is a change in the circumstances of the child within the meaning of section 489 of the Code aforesaid(r).

Although the Court may include of cost of minimum education for the child in awarding maintenance,it is not competent to sanction expenses for higher education under the summary----

(q) U.B.R. (1914-16) p.23.
(r) Maung Shwe Ba v. Ma Thein Nya. Ante.p. 219.

summary procedure provided by section 488 of the said Code. In Maung Shwe Ba's case, Mackney,J.,remarked: " So long as some minimum schooling is provided for the child, I do not think that its guardian can claim more under the summary procedure of the Criminal Procedure Code. If it is thought that Maung Shwe Ba should be compelled to provide for the education of his child in an Anglo-Vernacular school,the guardian might have recourse to a civil suit(s)".

Determination of Maintenance Order. An order passed in favour of a wife necessarily ends on death of either party or divorce between the couple. A bona fide reunion of the couple removes the basis on which the order rests,and therefore, vacates it(t). At one time, it was thought that a decree for restitution of conjugal rights obtained by the husband against his wife ipso facto discharged an order of maintenance passed in her favour. In Maung Dun v. Ma Sein (u) it was held that the Magistrate is not necessarily bound to follow the order of the Civil Court, but must consider it along with any other circumstances which may be brought to his notice. In Maung Po Kwe v. Ma Pwa Shein(v), it was very recently held that a decree for restitution of conjugal rights does not ipso facto cancel an order of maintenance, and that the Magistrate will be justified in refusing to cancel such order where the husband fails to provide separate accomodation for his wife in terms of the decree passed in his favour.

(s) Ante. p.219
(t) U Po Shein v. Ma Sein Mya. 8.Ran. p. 460.
(u) 3.Ran. p. 150. (v) R.L.R.(1939) p.741.

The maintenance order in favour of a child does not cease until it attains majority and is able to maintain itself. The provisions of section 488 of the Code of Criminal Procedure ordinarily contemplate the case of a child unable to maintain itself owing to its tender years, and in ordinary cases, a strong presumption would arise that when a child reached the age of majority (i.e., eighteen years),it was no longer unable to maintain itself. It seems that a child continues to be entitled to maintenance even after attaining majority, if by reason of any defect,mental or physical, it cannot earn a living(w). The order in favour of a child ceases as soon as the father lawfully obtains custody of it,or gets a custody order from a competent Civil Court.

Liability of a Buddhist Monk to Pay Maintenance. Once an order is passed for payment of maintenance, the Court will enforce it if it is satisfied that it has been disobeyed without " sufficient cause ". Whether a person has "sufficient means " or " sufficient cause " within section 488 of the Code of Criminal Procedure must be determined upon a consideration of the circumstances disclosed in each case. The term "sufficient means" is not confined to pecuniary resources, and a mere denial of an able-bodied man of sufficiency of means is not conclusive proof of want of sufficient means(x). Hence, a question arises whether a Buddhist monk is amenable to the provisions of section 488 of the Code of Criminal Procedure. In A.R.L.P.Firm v. U Po Kyaing and another(y), a Full Bench of the Rangoon High Court held that where a person becomes a phongyi (monk)

(w) U Ba Thaung v. Ma Aye. 10.Ran. p.194.
(x) Maung Tin v. Ma Hmin. 11.Ran.p.226. F.B.(y)R.L.R(1939)p.311 F.B.

(monk) without retaining an animus revertendi, he is automatically divested of all his properties, and he relinquishes all title to the same, and the only properties he can possess are articles falling within the four requisites or resources - food, clothing, lodging and medicine. Nevertheless, it may now be taken as settled law that a Buddhist monk is not placed in a privileged position, and is not exempt from liability to have a maintenance order passed or enforced against him under the statute,merely because he is a monk. In Maung Tin's case(z), Page,C.J., in a well-considered judgment said: " Upon what legal principle or upon what reasonable or moral ground could an order to that effect be supported? I cannot conceive of any. Surely, for so holding, there could be no justification. A man is none the less the father of his child because he happens to be a phongyi, and the child of a monk will starve as certainly as the child of a lay man if it is not supplied with sustenance. ... Many a man has found fatherhood irksome, and will feign be released from the obligations that attach to it. The answer however,that is given to such a person as well by the legislator as by the moralist, is that he should have considered the consequences that might ensue before he ran the risk of becoming a father ". After pointing out the error in the decision of Saunders,J.C., in Ma E Shi v. U Aditsa(a), the Lord Chief Justice continued: " Why should a phongyi in sexual matters be sacrosanct? And what difference does it make whether he does nor does not enter the priesthood in order to avoid his responsibilities as a

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(z) Ante. p.222.
(a) 1.B.L.J. p. 97.

a father? By so doing, it seems to me that he will acquire merit neither in this world nor the next ".

The effect of the said decision is that the Full Bench adopted the principle laid down by MacColl,J.C., in U Thiri v. Ma Pwa Yi(b). And in A.R.L.P. Firm's case (c), Ba U, J., rightly observed that those decisions are not only correct according to the Civil Law of the land, but also perfectly consistent with the Vinaya,in that no man could be ordained as a rahan* when a maintenance order remains outstanding against him, and a rahan ceases to be such,once he has sexual intercourse.

Claim Under the Statute is Cheaper. An application for maintenance under section 488 of the Code of Criminal Procedure requires only an eight-anna Court Fee stamp,irrespective of the amount claimed,subject however, to the maximum sum of one hundred rupees for each claimant per mensem.The award is made by summary procedure and payment can be enforced by any competent Magistrate throughout Burma without a formal transfer of the order directing payment of maintenance,to the Court where its enforcement is sought. A maintenance order under the statute can be enforced by attachment of properties or imprisonment,by way of recovering a criminal fine as the arrears fall due at the end of the month. It is only where the claim exceeds one hundred rupees for each claimant that recourse should be had to a Civil Court where the expenses are greater.

(b) IV. U.B.R. (1921-22) p. 138.

(c) Ante. p.222.

* Buddhist monk.

EFFECT OF MARRIAGE ON PROPERTY.

It is true that the Dhammathats mentioned the husband as the lord of his wife(a). According to the text from the Cittara, a wife who has no respect for her husband is liable to be punished criminally; it further recognized that the husband is naturally superior to his wife and where the conduct of the former is irreproachable, the latter must obey him even though he may be a hunter or a fisherman(b).

The texts cited in section 251 of the Kinwun Mingyi's Digest, Volume II clearly gave the husband unfettered control not only over the property of the wife including that acquired by her personal skill and labour, but also over her person. The following illustration in the Rasi will explain the old saying that the wife is in the power of her husband:

" The teachings of the Buddha contain the following story which supports the rule of the Dhammathat. One day, King Vessantara gave away his Queen Maddi Devi, having already given away his children the day previous. She did not show the least sign of anger, sorrow, or injured feeling, but with a natural and serene countenance looked at her lord and expressed herself thus:

" My Lord and King! You have every right to give me away to whomsoever you please. The person to whom I am given away may make me a slave, or sell me to

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(a) K.M.D.(II) Sec.251.

(b) Ibid. Sec. 213.

" to another, or kill me. I am your first married wife and you have complete control over me, and, in giving away your wife, of whom you have an absolute right of disposal, I shall not in any way be provoked. So do with me as you please ".

According to the Manugye(c), the woman who takes her husband's orders, disputes not his authority but complies with his wishes is an ideal wife.

However, the British Courts give recognition to the husband's absolute right of control over the joint property and person of the wife only in a limited sense. In Maung Ko v. Ma Me (d), the Special Court held that so long as the marriage subsists, the Court cannot decree an absolute dominion over the joint property to either husband or wife, but that the husband rather than the wife is entitled to possession thereof in trust for both. This principle was accepted in Nga Kan Za v. Mi Le(e) wherein it was held that the wife could not claim exclusive possession of any part of the joint property.

In Ma Thu v. Ma Bu (f), Fulton,J., explained in what sense the husband should be regarded as the lord of his wife,observing inter alia : " It cannot be disputed that in many instances, the husband manages the business of the family with the assent of his wife, express or implied, and where this is the case, sales effected by him will bind her. He is said to

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(c) Volume V. Sec. 13.
(d) S.J. p. 19.
(e) S.J. p. 126.
(f) S.J. p. 578.

" to be the lord of the wife, but I think this only means that she ought to be guided by his authority in matters in which his conduct is reasonable and proper. It does not seem to imply that he is absolute master of her property.".

Hence, U Chan Toon in his Principles of Buddhist Law(g) observed: " No doubt in the general management, the control of the household and of the children and family property will be vested in the husband, but this power may not be exercised arbitrarily and without consultation with the wife; and the usage of the people at the present time is such as to regard the wife an equal partner in the family interests. It not unfrequently happens that she is the bread-winner of the family, in which case her wishes and opinion will be of paramount importance.".

Consequently, the husband's right to assault his wife by way of chastisement is now regarded as obsolete and it cannot be tolerated inasmuch as it directly offends the provisions of the Penal Code which is a statute.

Wife's Property. Burmese Buddhist Law gives extensive rights to women in relation to ownership of property. It not only recognizes her separate property, but also her vested interest in the property brought by her husband to the marriage, or acquired by him singly or jointly with her during coverture. On the death of her husband, she becomes the principal heir and inherits the entire estate subject only the claim of one quarter share by a privileged child known as Orasa(h).

(g) At pp.41-42.
(h) Ma Sein Ton and two v. Ma Son . 8.L.B.R.p.501. F.B.

Theory of Partnership. The theory that a Burmese Buddhist husband and wife are partners was first conceived in Maung Ko's case(i) where it was held that neither husband nor wife was entitled to dominion over the joint property during the subsistence of marriage. That decision, it is respectfully submitted, indirectly asserted the theory of partnership between the parties to a Buddhist marriage which is dissolved only on divorce or on the death of one of them. In his Notes on the Incidents of Marriage(j), Sir John Jardine had said: " With respect to the management and acquisition of property, the Buddhist Law while distinctly recognizing the status, treats the husband and wife as if they were partners in the pr profits,unless perhaps the woman lives and has an establishment separate from her husband and takes no share either in the management of his business or in his household affairs ". He then gave express recognition of the partnership theory in Ma Hla Aung v. Ma E (k) wherein he observed in unmistakable terms: " The Buddhist Law favours the equality of the sexes and in many ways treats marriage as creating a partnership in goods". This view was accepted by the Chief Court of Lower Burma in Maung Twe and three v. Ramen Chetty (l).

In Upper Burma, the theory of partnership was upheld in Ma Me v. Maung Gyi(m) and U Guna v. U Kyaw Gaung(n).As observed by U E Maung (o), it is respectfully submitted that the decision in the former case was self-contradictory in that it recognized

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(i) Ante. p. 226.
(j) Notes I, para 37.
(k) S.J. p.219 @ 221.
(l) I. L.B.R. p.11
(m) II.U.B.R.(1892-96) p.45.
(n) II.U.B.R.(1892-96) p. 204.
(o) B.B.L. p.49.

recognized the creditor's right to attach and sell the husband's share and interest in the joint property before the partnership was dissolved by death or divorce. In the latter case, Burgess, J.C., for the first time formulated the theory of tenacy in common without abandoning the theory of partnership. And influenced by the said decisions, their Lordships of the Privy Council observed obiter in Ma Thaung and another v. Ma Than and others (p):"It is to be noted that in the Burmese social and legal system the wife is, to all intents and purposes, a partner".

The doctrine of partnership was first challenged by a Full Bench of the Chief Court of Lower Burma in Ma Shwe U v. Ma Kyin (q) wherein it was categorically laid down that the husband may lawfully alienate his share and interest in the joint property of the marriage, without his wife's consent and during the coverture, thereby over-ruling the decision in Maung Weik v. Maung Shwe Lu (r) to the contrary. That Full Bench decision was followed by the Courts in Burma for nearly half a century until a Full Bench of the High Court overruled it in Ma Paing v. Maung Shwe Hpaw and eight others (s) and definitely formulated the doctrine of partnership as extended to Burmese Buddhist husband and wife. Their Lordships fully discussed all available authorities touching the point and held as follows:

(p) 5. Ran. p.175 @ 178.
(q) III. L.B.R. p.66. F.B.
(r) I. L.B.R. p.184.
(s) 5. Ran. p.296 F.B.

(1) That at Burmese Buddhist Law, in respect of the property of the marriage whether that property be the payin* property of either party or lettetpwa* property of the marriage, a Burmese Buddhist husband and wife are partners and all the property of the marriage, whether payin or lettetpwa, is partnership property;

(2) that the partnership between husband and wife is dissolved only by death or divorce and neither partner is entitled to separate possession of any share of the partnership property or of the profits of the partnership until the partnership is dissolved by the death of one partner or by divorce;

(3) that where the interest of a husband in property which was either payin brought by him to the marriage or was jointly acquired lettetpwa, is during the subsistence of the marriage, sold in execution of a decree against him for a debt incurred by him in a business carried on by him while he was living with the wife, the buyer of that interest does not acquire the right to have the property partitioned and to obtain possession of part of the property as representing the husband's interest in it;

(4) that either husband or wife or both may represent the partnership in dealing with third persons and that a presumption ordinarily arises that debts contracted by either party bind the partnership and are recoverable out of the partnership property; and

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* For explanation of these terms, see infra p. 237.

(5) that there is a presumption that a suit brought against either of the partners is a suit against the partnership, and that in such a suit, a partner who is not joined as a party to the suit is represented by the partner who is joined as a party and a decree against either partner can ordinarily be executed against any partnership property, provided the decree was obtained against that spouse as representing the partnership.

The aforesaid decision inconvenienced business people dealing with Burmese Buddhists in that it has been decided solely from the point of view of giving relief to a creditor and left a creditor of an ante-nuptial debt without any remedy during the subsistence of the marriage. Its correctness was therefore, doubted by Pratt and Otter, JJ., in U Po U v. Ma Tok Gyi (t) and in the order of reference for its reconsideration by a Full Bench, Pratt, J., said: "Although the parties to a marriage are partners, it is obvious that the partnership is not an ordinary one, and that the law of partnership can only be applied with limitations". But the learned Judges who decided the reference were unable to depart from the views expressed in Ma Paing's case and they reaffirmed the theory of partnership by holding that a deed or gift executed by a Buddhist husband without his wife's consent of part of the joint property of the marriage was wholly void and conveyed no title to the donee in respect of the property which it purported to convey.

(t) 7. Ran. p.374 @ 377. F.B.

Theory of Tenancy in Common. In N.A.V.R. Chettyar Firm v. Maung Than Daing (u), Das, J., before whom the case was argued on second appeal again doubted the correctness of the decision in Ma Paing's case and referred for the decision by a Full Bench whether the joint property acquired by the husband and wife, possibly out of the property brought to the marriage by the couple is liable to pay the debts contracted by either of them before the marriage. At the hearing of the reference, the Full Bench (Page, C.J., Das and Maung Ba, JJ.), being in doubt whether Ma Paing's case was rightly decided, propounded for determination by a Special Bench inter alia whether the principles of law enunciated in that case are correct. Page, C.J., quoting with approval the dictum of U May Oung in his Leading Cases (v) that "the conception of a relationship akin to that of trading partners does not appear anywhere in the texts or in the general literature of the country, and pushed too far, may lead to complications undreamt of by the older jurists", and after discussing all previous authorities on the point, observed that Ma Paing's case laid down propositions of law which could not be justified under the Dhammathats and which ran counter to a cursus curiae in Upper and Lower Burma of nearly half a century. In holding that the husband and wife in a Buddhist marriage do not hold the property as joint tenants but as tenants in common, the Lord Chief Justice remarked: "This obviously, must be so, for on the death of husband or wife, the

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(u) 9. Ran. p.524. S.B. (v) At page 52.

the other spouse takes the interest of the deceased in the joint property by inheritance, and not by survivorship; and it seems to me that the fallacy that underlies the reasoning upon which Ma Paing's case was based, if I may venture to say so, is that it leaves altogether out of account the fact that the parties prior to the marriage possessed an interest in the property that they severally brought to the marriage. It will be admitted on all hands, and the learned Judges who decided Ma Paing's case would have conceded, that the husband or wife or both of them, if they brought property to the marriage, possessed a definite and vested interest in such property at the time when the marriage took place; it follows, therefore, if the legal position of the parties to the marriage was correctly stated in Ma Paing's case, that on the marriage taking place the parties automatically became divested in toto of the definite vested interest that up till the happening of that event they had possessed. Such a proposition appears to me opposed alike to good sense and good law (w)". The Special Bench then proceeded to lay down as follows:

(1) That the interest of the judgment debtor in the joint property of a Burmese Buddhist husband and wife can be attached in execution of a decree obtained against one of the spouses in respect of an ante-nuptial debt contracted by such spouse alone; likewise in such circumstances, the separate property, if any, of the judgment debtor can be attached;

(w) 9. Ran. p.524 @ 537 & 538.

(2) that a Burmese Buddhist marriage is not analogus to, still less identical with, an ordinary business partnership. There are no presumptions, de facto or de jure, that a Burmese Buddhist couple, living together, are agents for each other, or that the wife is deemed to consent to the acts of her husband. It is a question of fact to be determined according to the circumstances of each case;

(3) that where it is sought to execute a decree against the joint property of the husband and wife, it is not permissible to execute the decree by attachment of the interest in the joint property of a party to the marriage unless such party had duly been impleaded in the suit, and was bound by the decree;

(4) that the husband and wife in a Burmese Buddhist marriage do not hold the property as joint tenants, but as tenants in common. Each of them has a vested interest in such joint property, and such an interest is liable to attachment and sale in execution of a decree against the person entitled to it; and

(5) that either party to the marriage is competent to alienate or otherwise dispose of his or her own interest in the joint property, but neither of them is entitled to alienate the interest of the other without the consent, express or implied, of that party.

Carr, J., further was of the opinion that both spouses may become liable for the ante-nuptial debts of one only up

up the value of the property brought to the marriage by that spouse, if that property has since the marriage been dissipated by the couple, or has become so merged in the joint estate as to become inseparable from it, but that the creditor must sue both spouses to enforce such liability.

Maung Ba, J., while admitting that the interest of a spouse in his or her payin and the lettetpwa is vested, maintained his view that as between themselves, the law that neither party has a right to alienate his or her interest in the lettetpwa without the consent, express or implied, of the other is still good law.

The decision of the Special Bench in N.A.V.R. Chettyar Firm's case was wholly approved by their Lordships of the Privy Council in U Pe v. U Maung Maung Kha (x); consequently, the principles enunciated therein must now be regarded as settled law.

Joint Tenants and Tenants in Common. In a joint tenancy, on the death of a co-owner, his interest in the estate, passes to the survivor. But in a tenancy in common, the co-owners are entitled to rents and profits in proportion to their respective shares, and on the death of one of them, his share and interest in the estate passes to his heirs and not to his surviving co-owners. In that the husband and wife under Burmese Buddhist Law are now regarded as tenants in common, the surviving spouse must obtain a Succession Certificate or Letters of Administration before a decree can be obtained in respect of a debt due to the deceased (y).

(x) 10. Ran. p.261. P.C.

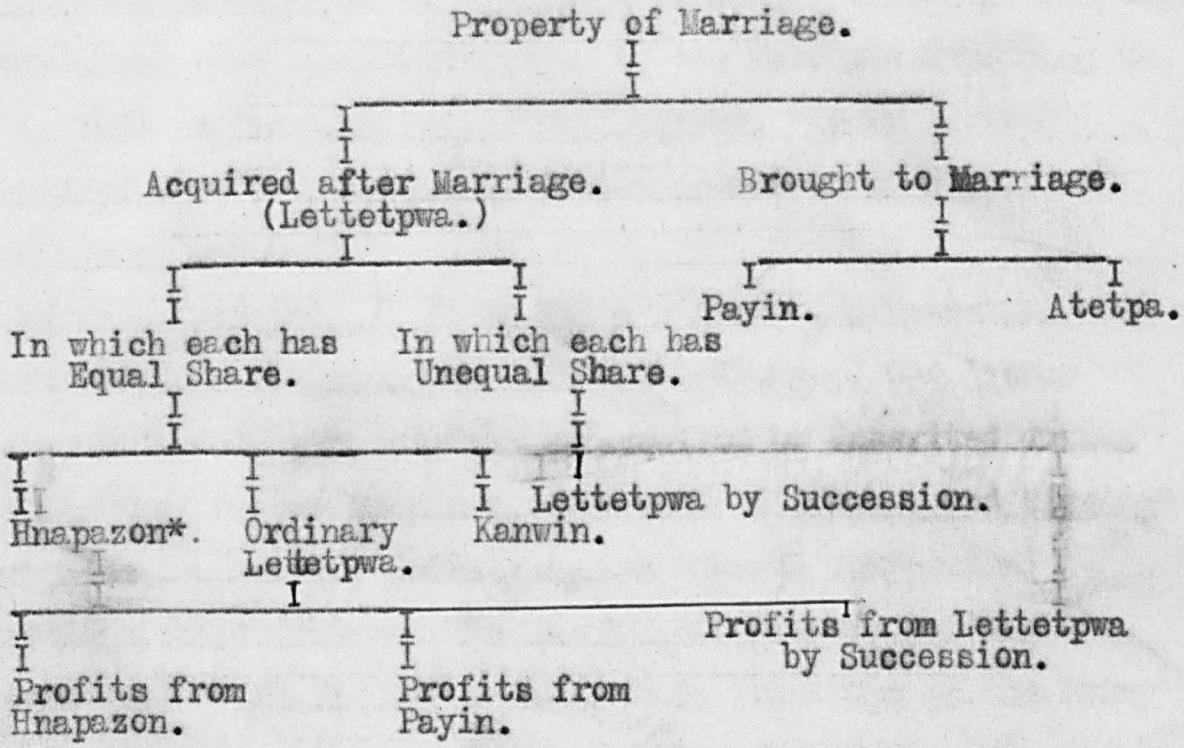
deceased(y).

Property of the Marriage. A Buddhist couple have to work together for their common weal. The texts from the Dhammathats cited in sections 208 to 214 of the Kinwun Mingyi's Digest, Volume II, laid down the duties of the spouses they owe towards each other, and one of the duties of the husband is to acquire wealth while one of the wife's duties is to protect it from waste. Owing to the influence of Buddhistic teachings, the wife is no longer treated as the husband's inferior, and equality of the sexes has been more or less established in modern Burmese society. Nowadays, the Customary Law has given due recognition to separate ownership of property by both husband and wife during coverture; each of them acquires a vested interest in all property of the marriage, the extent of that interest depending however, upon the nature of the property.

The classification of property of the marriage in the Dhammathats does not appear to be consistent or systemetic. Efforts are being made in this thesis to reclassify it in the light of decisions of the British Courts which, ofcourse, are mainly based upon the texts from the Dhammathats. In C.T.P.V. Chettyar Firm and others v. Maung Tha Hlaing and others(z), Maung Gyi, J., appears to have rightly observed: " To my mind, the proper main classification of the property belonging to a husband and wife is into payin what is brought to the marriage by either or both , and lettetpwa property acquired after the marriage in any way. The other terms used are merely subdivisions of those two main classes ". This

(y) Maung Po Htwa v. Ma Ngwe Zin, R.L.R.(1937) p.396.
(z) 3. Ran. p. 322 @ 332.

This broad classification was accepted by Maung Ba and Chari, JJ. in Ma Paing's case (a). The table hereunder may, perhaps, help to understand those subdivisions better:



Lettetpwa. It is joint property of the marriage. It comprises all property which is acquired during coverture, either by particular exertion or by succession. It is subdivided into two main groups, one in which the husband and wife hold equal shares and the other in which they hold unequal shares.

(a) 5. Ran. p.296 @ 332 & 337-338.

* Hnapazon is sometimes referred to as Lettetpwa, jointly acquired Lettetpwa, and occasionally as Hnapazon-lettetpwa.- Mootham's Burmese Buddhist Law at p.9.

Hnapazon. It is the property acquired during the marriage by mutual skill and industry or joint exertion of the couple. Until the Privy Council's decision in U Pe's case (b), Hnapazon was treated as a special kind of Lettetpwa. But their Lordships were apparently asked by the counsels appearing in the case to treat it as a distinct kind. It is, however, settled law that the share of each spouse in this property is always one-half.

Ordinary Lettetpwa. In Ma Paing's case (c), Lettetpwa was divided into Hnapazon and Ordinary Lettetpwa, the latter comprising all property either acquired or inherited during coverture, except Hnapazon. The rule of Nissaya and Nissita* applies to Ordinary Lettetpwa, the Nissaya (supporter) getting two-thirds and the Nissita (dependant) getting one-third. But in U Pe's case, their Lordships of the Privy Council seem to have excluded Hnapazon from Lettetpwa, and subdivided the latter into Ordinary Lettetpwa and Lettetpwa by Succession, giving on partition, two-thirds of it to the spouse who actually made it or succeeded to it and one-third to the other. Hence, Ordinary Lettetpwa means and includes the property acquired by either spouse by individual exertion during the subsistence of the marriage.

U Pe's case dealt with Lettetpwa by Succession and their Lordships of the Privy Council were apparently correct in holding that the spouse who succeeded to it was entitled to

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(b) 10. Ran. p.261. P.C. (c) Ante. p.237.

* See Infra p.244.

to two-thirds. But it is most respectfully submitted that the assertion by the counsels that the rule of Nissaya and Nissita is also applicable to Ordinary Lettetpwa acquired by either spouse by individual exertion appears to be inaccurate for the reasons to follow.

The expression: "On partition, lettetpwa goes two-thirds to the spouse who actually made it or succeeded to it and one-third to the other (d)" cannot be regarded as the dictum, far less the decision of the Board. It is merely a statement of law on the point as mutually understood by the learned counsels appearing on both sides, and that is made clear by the first sentence of the paragraph:"Before stating the grounds of action, it will be well to state the Burmese Buddhist Law in regard to the property of married persons so far as it is not a matter of controversy between the two parties". Consequently, it cannot be taken as settled law.

The decisions whether the wife should be given one-half share in the property acquired by the husband's individual skill and industry appear to be few. In Maung Shwe Lin v. Mi Nyein Byu (e), the earnings of a lawyer or of a goldsmith seem to have been claimed as Lettetpwa acquired by individual skill and industry. U May Oung also regarded the earnings of artisans, salaried officers and professional men as Lettetpwa of similar nature, and advocated for the extention of the rule of Nissaya and Nissita to such income, on the basis that

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(d) U Pe v. U Maung Maung Kha. 10. Ran. p.261 @ 268. P.C.
(e) S.J. p.175 @ 177.

that it is earned by the husband alone while the wife does nothing(f). With due deference to U May Oung, the writer begs to disagree. The text from Dhammathatkyaw cited in section 237 of the Kinwun Mingyi's Digest, Volume II inter alia reads as follows:

> " There certianly cannot be prosperity when both husband and wife lack goodness and virtue . It is only when both husband and wife are equally good and virtuous, and clever and wise, and when one is the helpmate of the other, both trying to acquire property jointly and agreeably, that they are well and harmoniously matched like the soil and rain or gold and emerald , and will assuredly obtain many children, have several slaves and attendants, and get more and more prosperous like the rising sun and the waxing moon ".

The said passage clearly shows that the property acquired during the subsistence of the marriage,though it may be the individual earning of only one spouse, is regarded in Burmese Buddhist Law as if it were acquired by the couple by joint skill and industry , and where the husband and wife prove to be helpmates to each other both in prosperity and in adversity, the property so acquired shall, it is submitted, be equally divided between them if they desire to separate as laid down in the Manuvannana(g).

(f) L.C. on B.L. p.57.

(g) K.M.D.(II). Sec. 254.

The incorrect translation of the last paragraph of section 3 of Book XII of the Manugye by Richardson gives rise to doubt as to the meaning of Lettetpwa property. The Burmese text reads as follows:

"
အသျှင်ဘုရားကလည်းသနား၍တော်မူရာ၌သည်ဥစ္စာ"နှစ်ဦးသဘင်သည်ပါဂူးဥစ္စာ"
နှစ်ဦးသဘင်မှ စာယောက်ယောက်က ရသည်မိဘအမွေရင်းဥစ္စာကိုအဂူးတို့၌
တည်မြဲမူ့"ဂူးကဟူးသည်ကိုလက်ထက်ဟူးတဲ့မှတ်ကြလော့" ဆိုခဲ့ပြီး
သောကြောင့်အထူးဖွင့်ဆိုစရာမလိုတော့ပါ။"

Mr.Richardson's translation runs thus:

" Property obtained by the royal bounty, property in possession at the time of marriage, property that either may have inherited from their parents after marriage, these and the profits on them shall be considered as property acquired during the time they were together, and in accordance with this, let the property be divided."

Sir John Jardine in his Notes on Buddhist Law(h) translated that passage thus:

" Property given by the king being property brought at the time of marriage, and property inherited by either party from their parents after marriage, having become the separate capital(အဂူး ahyin) the increase on profits from them, shall be considered as lettetpwa and let it be divided as laid down above."

In Mi Myin v. Nga Twe and two others(i), Shaw, J.C., challenged the correctness of Richardson's translation given above and ~~translated it thus~~ gave his own translation as follows:-

(h) Reproduced at 3.Ran. p.334.
(i) II.U.B.R.(1904-06) Divorce. p.19.

" Property obtained by gift from the king(payin) at the time of marriage, property inherited by either from parents during marriage, having been (as before explained) placed (i.e., classified and dealt with) according to its origin (ဆဂ္ဂေးဆတိုင်း) profits accruing from such property should be regarded as lettetpwa. Let the parties divide between them in accordance with what has been said before."

The same passage is given in section 264 of the Kinwun Mingyi's Digest,Volume II and the official translation thereof reads thus:

" Let each take the property given him or her alone by the king, that brought by each to the marriage, and that inherited by each from his or her parents subsequent to the marriage. The profits which accrue from the different kinds of property shall be treated as lettetpwa or jointly acquired property, and partition of it shall be made according to the rules already laid down ".

It is respectfully submitted that the translations of Richardson, Sir John Jardine and Shaw,J.C., are incorrect and that the official translation of the Digest gives the nearest approach to the Burmese text. In C.T.P.V. Chetty Firm's case(j) Maung Gyi,J.,had made a similar observation. In the circumstance, it may be taken as settled law that profits arising from the property given by the king to either spouse, from Payin of each

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(j) 3. Ran. p.322 @ 335. F.B.

each spouse and from inherited property of either spouse during coverture is Ordinary Lettetpwa in which the shares of the couple are equal. Profits from Hnapazon may be treated similarly. Kanwin. It is the property set apart at the time of marriage by the bridegroom or his parents for the joint purposes of the married pair. But where the property is not set apart as Kanwin but is simply entrusted by the parents to the bridegroom to manage, he and the parents shall share it equally. If he dies without children, his widow shall take half and his parents half(k). In Lu Gale and one v. Maung Sein(l), it was held that Kanwin includes the gifts by the parents of the bride and on the latter's death without an issue, her husband shall inherit such property as against his parents-in-law. U May Oung observed that presents received from other friends and relatives at the time of marriage, though technically they may not be called Kanwin, should be treated as such(m).Payin property may be declared as Kanwin at the time of marriage, but if it is immoveable property, it can only be made by a duly registered deed(n). A gift of immoveable property as Kanwin without a duly registered deed as required by section 123 of the Transfer of Property Act is void(o). In Kanwin property, the spouses always share equally.

(k) Ma Hla Aung v. Ma E. S.J. p. 219.
(l) VI. L.B.R. p.16.
(m) L.C. B.L. p.54.
(n) Ma E Nyun v. Maung Tok Pyu,II.U.B.R.(1897-01) p.39.
(o) Maung Shwe Kho v. Ma Mya. 9.B.L.T. p.87.

Rule of Nissaya and Nissita. This rule of Supporter and Dependant is quite simple. The relation of Nissaya (supporter) and Nissita (dependant) is said to exist in the following cases:

(a) When one spouse brings inherited property to the marriage while the other brings nothing;

(b) When one spouse has acquired property during coverture by his or her own skill and labour; and

(c) When the property is given specially to one spouse by the King or Government(p).

The same rule applies to any inherited property by either spouse during the subsistence of the marriage(q). The supporter (nissaya) always gets double the share of the dependant (nissita) in the property to which this rule is applicable(r).

According to the Manugye(s) this rule is applicable only where the parties to the marriage are ngelin-ngemaya (virgin couple), but in Ma Ngwe Hnit's case, the Chief Court of Lower Burma extends its application to a case in which the husband alone has been married before and he brings much property to the marriage with a spinster who brings nothing. It seems that the rule does not apply as between eindaunggyis (both spouses who are previously married),with regard to inherited Payin(t).

Payin. It is the property possessed by either spouse before the marriage, where the couple are ngelin-ngemaya, or only one of them is an eindaunggyi. Following the provisions of section

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(p) Section 3,Book XII.Manugye.
(q) Ma Ngwe Hnit v. Maung Po Hmu. XI. L.B.R. p.52.
(r) Sec. 3. Book XII. Manugye.
(s) Supra.
(t) Mi Saing v. Nga Yan Gin. U.B.R.(1914-16) p. 127.

section 229 of the Kinwun Mingyi's Digest, Volume I and section 8 of Book X of the Manugye, Heald, O.C.J., and Maung Ba, J., held in Ma Nwe v. Ma Sai Da(u) that where on the death of the first wife, the husband remarries, Payin to the second marriage includes property acquired during the former marriage as also the property acquired after the termination of the first marriage but before marrying the second wife.

There is a conflict of opinion on the point whether Payin should be regarded as property of the marriage, and it is true that the point is not entirely free from ambiguity. On the one hand, there are decisions(v) that the owner of Payin has an absolute right of alienation over the whole of it,without reference to the other spouse, during the subsistence of the marriage, while on the other hand, decisions (w) are not wanting giving the other spouse one-third vested interest in all property brought by one to the marriage, applying the rule of Nissaya and Nissita. If the owner of Payin has an absolute right of disposal over it while the marriage subsists, such property cannot be rightly considered to be property of the marriage.

The study of the texts from the Dhammathats and relevant decisions on the point has enabled the writer to deduce the following principles of law concerning Payin property of a

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(u) 7. Ran. p. 578.
(v) Mi San Shwe v. Valliappa Chetty and two others.10.B.L.R.p.49.
Mi Myin v. Nga Twe and two. 2.U.B.R.(1904-06).B.L.Dvn.p.19.
(w) Maung Po Nyun v. Ma Saw Tin. 3.Ran. p.160.
C.T.P.V.Chetty Firm v.Maung Tha Hlaing. 3.Ran. p.322 F.B.
U Maung Nge v. P.E.E.P.Chettiar Firm. A.I.R.(1934)Ran.p.200.

a couple:

(1) Payin property is that possessed by either spouse before the marriage. It may be either animate or inanimate(x).

(2) Payin of a spouse consists of (i) property inherited by that spouse from his or her parents before the marriage and (ii) property obtained by that spouse through individual exertion before the marriage(y).

(3) The owner of Payin can, during the subsistence of the marriage, dispose of the whole of such property without reference to the other spouse(z).

(4) If Payin is exhausted during coverture, no claim for its restitution can be made when the marriage is dissolved(a).

(5) If both spouses brought Payin to the marriage, Payin of each will revert to the owner on divorce by mutual consent(b).

(6) But when only one spouse brought Property to the marriage and the other not, the rule of Nissaya and Nissita will apply only to such Payin as might have been inherited by that spouse from his or her parents before the marriage(c). It seems that Payin acquired by that spouse by individual exertion before the marriage will revert to the owner, when divorce is by mutual consent.

(7) Payin which is divisible on divorce is that which still remains in tact at the time. In Mi Myin's case, Shaw, J.C., observed: " Mi San Shwe's case is not one of divorce. The question was as to the right of a husband to dispose of his payin during the subsistence of the marriage. It was held that it was not shown that a husband has no power to alienate his payin. The question is not affected by the rule of law which prescribes how payin is to be dealt with (when it still exists) at partition on divorce." In Ma Paing v. Maung Shwe Hpaw and eight others(d), Chari, J., also observed: " This shows that the interest of the wife, at partition on divorce, in the husband's payin is contingent on its existence as family property at divorce ". It therefore, seems clear that the spouse who is not the owner of Payin has no vested interest in Payin of the other.

(x) Section 3 of Book XII. Manugye.
(y) C.T.P.V. Chetty Firm v. Maung Tha Hlaing .3.Ran.p.322 @ 342.
(z) Mi San Shwe v.Valliappa Chettyar and two. Ante. p.245.
Mi Myin v.Nga Twe and two. Ante p. 245.
(a) Extracts from the Rasi, Manuvannana and Panam.Sec.254K.M.D(II).
(b) Ibid.
(c) Section 3,Book XII.Manugye. & C.T.P.V.Chetty Firm's case.Supra
(d) 5.Ran. p.296 @ 342. F.B. per Chari,J.

(8) Payin of a spouse means the property he or she brought to the marriage less his or her ante-nuptial debts(e).

(9) Profits arising from Payin are Ordinary Lettetpwa(f).

(10) Payin ceases to be such if it were declared as Kanwin at the time of marriage(g). But if Payin so declared is immoveable, it must be in writing and duly registered (h).

The result is that only the inherited Payin has the chance of becoming property of the marriage provided that:

(i) The spouse other than the owner of that Payin must not have brought any property to the marriage, when only the rule of Nissaya and Nissita will apply, and

(ii) The inherited Payin still exists as family property at divorce.

In the circumstances, it may be said that the spouse who is not the owner of Payin has only one-third contingent interest (i) in inherited Payin only.

If a property is purchased with Payin of one spouse, it becomes Hnapazon of the marriage(j), but mere change of form does not necessarily affect the rule that so long as the corpus of Payin is capable of being identified, it always remains as Payin(k). Following Mi San Shwe's case(l), Dunkley,J, held in S.P.L.S.Chettyar Firm v. Ma Pu(m) that a house built on Payin land with Lettetpwa funds becomes Payin in that the more valuable part of the property is the site and the maxim quicquid plantatur solo, solo cedit is applicable.

(e) N.A.V.R. Chettyar Firm's case. 9.Ran.524. S.B. P.L.S.P.Chetty Firm v.U Maung Nge. A.I.R.(1935) Ran.p.399.
(f) Sec.3. Book XII. Manugye.
(g) Ma E Nyun v. Maung Tok Pyu. II.U.B.R.(1897-01) p.39. Mg San Shwe's case. Ante p.246.
(h) Ma Shwe Kho v. Ma Mya. 9.B.L.T.p.87. Ma E Nyun's case. Supra.
(i) Ma Paing's case. 5.Ran.296 F.B. per Chari,J @ p.341.
(j) Ma Ba We v. Mi Sa U. II.L.B.R. p.174. (1) Supra.
(k) Maung Shwe Tha v. Ma Waing. XI.L.B.R.p.48.
(m) 14. Ran. p.697.

In Maung Chit Kywe v. Maung Pyo (n), Payin consisted of a fund invested in the mortgage of immoveable property.The mortgage was redeemed during coverture, and the fund was re-invested on a new mortgage. It was held that the character of the fund as it originally was, was not altered.

Where the immoveable Payin of one spouse is sold and a new property is purchased with the sale proceeds and part of Payin of the other spouse, the property thus acquired becomes Hnapazon(o).

In Ma Pu v. Maung Ngo(p), it was held that the right in the lease of a land during coverture is regarded as Hnapazon although the squatter's right in relation to that land may be possessed by the husband before the marriage.

Atetpa. Where both the husband and wife are eindaunggyis, their Payin is known as Atetpa. In Ma Paing's case(q),it was held by Chari,J.,that in Atetpa property, each spouse has an absolute vested interest in his or her own. In Nga Tun Baw v.Nga Kan(r), it was held that an eindaunggyi wife can alienate the whole of her Atetpa as she pleases, provided that she does not give it to her paramour. This view finds support in the text from Panam cited in section 252 of the KinwunMingyi Digest,Volume II and section 406 of the Attasankhepa, but Heald and Maung Ba,JJ., doubted its correctness in Ma Paing's case, relying on the text from the Manussika cited in the aforesaid section of the Digest. It is respectfully submitted that the text from the Manussika

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(n) II.U.B.R.(1892-96) p.184.
(o) Maung Tun Gyaw v. Maung Po Thwe. 1.B.L.J. p.160.
(p) 6.Ran. p. 234. (q) Ante p.247.
(r) 4.B.L.T. p. 244.

Manussika appears to have been an outcome of the obsolete view prevailing at the time of its compilation that the husband is the lord of the wife. Consequently, it cannot be taken as an expression of recent custom on the point. The Attasankhepa is the latest Dhammathat written by the Kinwun Mingyi; hence, the principle of law as contained therein should be preferred to that found in earlier Dhammathats.

Atetpa reverts to its owner on divorce by mutual consent(s). The same rule applies where divorce is granted through the fault of one of the spouses(t). It is, therefore, obvious that Atetpa is not partible on divorce. The reason for this special treatment appears to be that " in the case of a first marriage, there are no interests to be considered other than those of the husband and wife and of their children. But when either or both has been married before, it is likely that there will be children of the first marriage and their interest also have to be considered(u)."

Lettetpwa by Succession. It is now settled law that where one of the couple inherits any property during coverture, that becomes property of the marriage. The rule of Nissaya and Nissita applies to this class of property and the share of the spouse who inherits it is always double of the other's share(v). Profits from Lettetpwa by Succession shall be treated as Ordinary Lettetpwa(w).

(s) Section 257. K.M.D.(II).
(t) Maung Yin Maung v. Ma So. II.U.B.R.(1897-01) p.34. Section 259.K.M.D.(II). See also M.O. L.C. p.110.
(u) C.T.P.V.Chetty Firm's case. 3.Ran. p.322 at 346 per Carr,J.
(v) U Pe v. U Maung Maung Kha. 10.Ran. p.261. P.C.
(w) Sec.3. Book XII. Manugye. See also ante p.242-243.

Other Properties. The Dhammathats speak about personal property of husband and wife, but the Cittara alone gives its definition. The husband's personal property includes personal attendants, elephants,ponies, sword, and men's wearing apparel such as pasoe (loin cloth), jacket and turban(x),whereas,the wife's personal property includes wearing apparel such as tamein (skirt), long sleeved coat, jacket, belt, weaving and spinning appliances(y). Jewellery made by the husband for his wife is not necessarily her sole property.Such jewellery is regarded by both husband and wife as their joint property. His intention to give her the jewels so that they should be her sole property, if alleged, must be clearly proved(z).

Minbe. It is the property given by the King or Government solely to one spouse. The rule of Nissaya and Nissita applies to such property(a). Profits arising from it are treated as Ordinary Lettetpwa(b).

Thinthi. Major Sparks regarded Thinthi as the separate property of either spouse. The distinguishing feature of it according to him,is that the spouse who is not the owner has no power whatsoever over it(c). Thinthi has been defined by him to include the following property:

(1) what belonged to either before marriage;

(2) what has been given especially to either since marriage;

(3) what has come into the possession of either by inheritance from his or her own family since marriage;and

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(x) Sec. 242. K.M.D(II). (y) Sec.243. K.M.D.(II).
(z) Ma Yin U v. Ma Lun. 1.B.L.T. p.11. (a)Sec.3.Book X.Manugye.
(b) See ante p.242-243. (c) Spark's Code , 16.

(4)clothes, jewels and ornaments(d).

In giving this definition of the term Thinthi, Major Sparks relied upon section 81 of Book X of the Manugye, which apparently sets out twelve kinds of thinthi " own property or separate share of children ". It is, therefore, respectfully submitted that his definition of Thinthi as property relating to husband and wife is inaccurate on the face of the authority he himself had cited. Moreover, properties mentioned in items (1) to (3) aforesaid, if treated as those concerning husband and wife, are identical with Payin, Minbe and Lettetpwa by Succession respectively. Consequently, it cannot be said that the spouse other than the one who brought or acquired them has no interest in them, and it is now settled law that a spouse who does not inherit has one-third vested share in the inherited property of the other and that vested interest can be disposed of without restriction even during coverture. This being so, it is submitted that there is no justification any longer to continue the use of the terms Thinthi or separate property in respect of such properties. Clothes mentioned in item (4) correspond with personal property of the spouses mentioned in sections 242 and 243 of the Kinwun Mingyi's Digest, Volume II; but jewels and ornaments made by the husband for his wife is not always treated as separate property of the latter, but as the joint property of the couple(e). The writer, therefore, agrees with the views of U E Maung(f): " The various kinds of thinthi spoken of by the dhammathats bear semblence to the exceptions grafted on the earlier Roman

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(d) Jardine's Notes I, para 39.
(e) Ma Yin U v. Ma Lun. Ante p.250.
(f) B.B.L. pp.62-63.

"Roman rule of proprietary incapacity of filius familias ; the dhammathats broadly defined Thinthi as property which the children could hold as against their parents and which on the death of their parents could not be treated for purposes of inheritance and division as part of the estate of the parents." The result is that there is no property known by the term Thinthi as between husband and wife.

Power of Alienation. With the discontinuance of recognition of the husband as lord of the wife, the provisions in the Dhammathats cited in section 251 of the Kinwun Mingyi's Digest, Volume II to the effect that the husband has full control over the joint property must now be regarded as obsolete. According to the principle laid down in N.A.V.R.Chettyar Firm v. Maung Than Daing(g), either husband or wife can during coverture, freely dispose of his or her vested interest in property of the marriage without consent of the other spouse. This decision was approved by their Lordships of the Privy Council in U Pe v. Maung Maung Kha(h). The couple can of course dispose of the whole of the joint property by mutual consent. There is no presumption that a Buddhist couple living together are agents of each other in their dealings with third parties; nor can the wife be deemed to have consented to the acts of her husband. Whether one of the spouses has acted as the agent of another in any particular transaction must be established by evidence in each case(i). But where the husband manages the family business, sale by him of moveable property such as cattle in pursuance of the common business will bind the wife (j); further evidence

(g) 9.Ran. p. 524.S.B. (j) Mg.On Sin v.Ma O Net. [illegible] U.B.R.(1892-96)p.303.
(h) 10.Ran. p. 261. P.C. (i) N.A.V.R.Chettyar Firm's case.Supra.

evidence,however, will be necessary to prove that the wife has consented and has made no open protest against alienation of immoveable property by her husband(k), if it is to bind her.

Payin or Atetpa may be alienated freely by the spouse who brings it to the marriage, during the subsistence of marriage; but it seems an eindaunggyi wife cannot give away her Atetpa to her paramour(l).

Where the wife sells any property of the marriage with her husband's consent, the sale is binding on both husband and wife and the wife does not require a power of attorney from her husband to execute the sale deed(m).

Where during the imprisonment of the husband, the wife sells a hnapazon property to meet the expenses incurred in defending her husband in the criminal case and to pay fishery revenue payable by the husband, the sale is binding on both(n).

It is submitted that the same rules apply to mortgage of immoveable properties by either spouse during coverture.*

Liability for Decrees. It may now be regarded as settled law that a decree cannot be executed against a spouse unless he or she has been duly impleaded as a party to the suit, and the interest of the spouse not so impleaded in the joint property cannot be attached in execution of a decree obtained against the other spouse only(o). Damages for wrongful attachment may be claimed by the spouse whose interest in the joint property is attached,although she is not a co-judgment-debtor(p).

(k) Maung Twe v. Raman Chetty. I. L.B.R. p.11.
(l) See ante p.248. * U Rai Gyaw Thu & Co. Ltd. v. Ma Hla U Pru. R.L.R. (1940) p.180.
(m) Maung Tun Hyat v. Raman Chetty. P.J. p.37.
(n) U Min Din v. Maung Shwe Hta. A.I.R.(1930) Ran. p.211.
(o) N.A.V.R.Chettyar Firm's case. 9.Ran. p.524. S.B.
(p) Ma Thaing v. Maung Tha Gywe,II.U.B.R.(1902-03) Execu.p.1.

Where the property mortgaged by the husband stands in the joint names of himself and his wife, a mortgage decree passed against him only, in a suit in which the wife is not impleaded as a party, cannot be executed by attachment of the wife's interest in that property(q). The same rule applies even if the husband has mortgaged the joint property with the wife's knowledge and consent(r); and where he has done so, he cannot be considered to be the benamidar of his wife in regard to her interests in the joint property(s).

It has been said that Payin or Atetpa property is liable to be attached in execution of a decree against the spouse who brought it to the marriage for his or her ante-nuptial or post-nuptial debts(t). And both spouses may become liable for the ante-nuptial debts of one only, to the extent of Payin of that spouse, if that property has since the marriage been dissipated by the couple otherwise than in discharge of such ante-nuptial debts, or has become so merged in the joint estate as to render its separation therefrom impossible(u).

Liability for Debts. A personal debt of one spouse does not bind the other spouse, and there is no presumption that a married couple living together are agents of each other, and a wife cannot be deemed to have consented to the acts of her husband(v). Whether one has acted as agent of another is a question of fact to be decided in the circumstances obtained in each case.

(q) Ma Sein v. Muthukarpan. VII. L.B.R. p.135.
(r) Ma Hme v. Ma Pon. 11.Ran. p.112.
(s) Ma Nyun v. Teixeira. X.L.B.R. p.36 @ 40. F.B.
(t) See ante p. 247.
(u) M.A.V.R.Chettyar Firm's case. 9.Ran. p.524 S.B.
(v) Ibid. at p.536 per Page, C.J.

A general power of attorney given by the wife to her husband does not empower the latter to sign a promissory note unless it can be shown that he is acting as her agent in so doing(w).

Under section 187 of the Contract Act,(IX of 1872), the husband is liable for the debts contracted by his wife for necessaries.

(w) Maung San Pe v. Maung Kyan. 11.B.L.R. p.203.

DIVORCE.

Every where in this country and especially amongst respectable Buddhists, it is a great exception to divorce or to be divorced. Among the great mass of the people, it is very uncommon and public opinion has a great check upon it. But marriage is as easily dissolved as it is contracted. Some people think that it is a loose tie too easily unloosed. With this facility for divorce, it is remarkable how uncommon it is. Marriage according to the Buddhist idea, is a partnership of love, affection and sympathy, and when these die, it should be ended. In Buddhist Customary Law as in all other systems of jurisprudence, the marriage is dissolved by the death of either spouse or by divorce.

Divorce is effected in one of the following ways:

(1) by mutual consent,

(2) by decree of a Civil Court of competent jurisdiction

(3) by desertion, and

(4) by the husband entering the Buddhist monkhood.

By Mutual Consent. Where the husband and wife for any reason or without any reason no longer wishes to remain united as man and wife, they can dissolve the marriage by mutual consent without going to Court. No witnesses are necessary and a deed of divorce need not be drawn up(a). Where a divorce deed is drawn up, it must be stamped as required by Article 29 of Schedule I of the Stamp Act (II of 1899) as amended from time to time. The consent must be expressed on both sides.

(a) Mi Hnin Ngon v. Nga Aung and one. S.J. p. 73.

Hence, the mere sending to the wife, a letter intimating an intention to divorce at the time when the wife was out of her mind does not constitute a valid divorce(b). The intention of both parties must be to dissolve the union for good. Thus, a sham divorce effected by the couple on the advice of an astrologer until such time as the planets are favourably placed in order to overcome illness or misfortune - commonly known as jyobye-nanbye divorce - does not sever the marriage tie, and the couple can resume cohabitation without a formal remarriage when the specified time is over(c). It is not a divorce in the legal meaning of the term(d). A mutual consent divorce takes effect immediately upon the conclusion of the agreement between the parties.

By decree of a Civil Court. A Civil Court of competent jurisdiction(e) may pass a decree dissolving a Buddhist marriage for one of the following matrimonial offences, at the instance of an innocent spouse:

(1) adultery by the wife;

(2) taking of a second wife (in certain circumstances*) by the husband without the consent of the first wife;

(3) cruelty by either spouse.

Adultery by the Wife. In Maung Pya Gyi v. Maung Po Kin(f), the wife committed adultery, admitted her guilt and left the conjugal home. Maung Kin, J., held that the husband was, in the

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(b) Mi Chin Mari and three others v. Mi Tu Ma. S.J. p.74.
(c) Maung Ba Oh v. Maung San Bu and one. Chan Toon's L.C.(I)137.
(d) Ma Hmon v. Ma Tin Kauk. 1. Ran. p.722 @ 735.
(e) See Chapter VII .p.41.
(f) 9.B.L.T. p.74.

* See Chapter XVI. p. 170, foot-note(i).

the circumstances, entitled to abandon her, and if he did so, the marriage was at an end as from the date on which she left the house. It is most respectfully submitted that this decision is incorrect. A more reasonable view was taken by Heald,J., in Ma Me Hla v. Maung Po Thon(g) wherein it was held that adultery on the part of the wife does not ipso facto put an end to the marriage. The marriage tie subsists until it is dissolved by a decree of a Civil Court.

Taking of a second wife. Inasmuch as the right of polygamy has been judicially affirmed by their Lordships of the Privy Council(h), it was at one time doubted whether taking of a second wife by the husband without the first wife's consent constitutes a sufficient cause for divorce by the latter.In Ma In Than v. Saw Hla(i), the Special Court held that it was not a sufficient cause for divorce. It is unnecessary to discuss various other authorities on the point, for in Maung Hme v. Ma Sein(j),the Chief Court of Lower Burma considered all the available texts and previous decisions in both Upper and Lower Burma touching it,and a Full Bench decided that subject to exceptions of the kind mentioned in sections 219,232,265-267 and 311 of the Kinwun Mingyi's Digest,Volume II, if a Buddhist husband takes a second wife without his chief wife's consent, she has the right to divorce him, and that if she decides to claim the right of divorce,the division of property, in the absence of any contract to the contrary, should be made as in the case of divorce by mutual consent. This decision has the support of most of the texts cited in section 256 of the Kinwun

(g) 7.Ran.p.98 (i) S.J. p. 103.
(h) See Chapter XVI. @ pp.170-171. (j) IX.L.B.R. p.191. F.B.

Kinwun Mingyi's Digest, Volume II besides section 173 of the Vannana which reads as follows:

" The husband without the consent of the wife takes another woman; all debts shall be paid by him and he (be) then turned out of the house naked as he was born(k)"

A similar rule is laid down in the Kinwun Mingyi's Atta-sankhepa section 393. It may, therefore, be assumed that taking of a second wife without the consent of the first wife is a sufficient ground for a divorce at the instance of the latter. It is, however, necessary to consider the effect of the provisions of sections 219, 232, 265-267 and 311 of the Kinwun Mingyi's Digest, Volume II which, according to Maung Hmo's case, provide exceptions to the general rule aforesaid.

Section 219 of the Digest deals with five kinds of wives who may be put away, viz: (1) A barren wife, (2) a wife who gives births to daughters only, (3) a wife who is leprous, (4) a wife who does not behave according to the rules of conduct governing her class, and (5) a wife who has no love for her husband.

Only the text from the Manugye cited in section 232 of the Digest gives the husband the right to take a second wife. It says: " The husband should on his part, attend upon and carefully look after his wife who may become leprous, insane, consumptive, maimed, blind or paralysed. He may cease to have conjugal relations with her, and take a second wife, but shall not put her away altogether after taking all the property."

Section 265 of the Digest requires a husband to put away his barren wife only after the lapse of eight years.

(k) Jardine's Notes III. page 30.

Section 266 of the Digest authorizes the husband to put away a wife who has borne eight or ten daughters but not a single son.

Section 267 of the Digest enjoins upon the husband of a woman suffering from leprosy, epilepsy or some other disease of like nature to try his best to cure her of the disease before putting her away, and only when it proves to be incurable, to marry a second wife.

Section 311 of the Digest appears to deal with the right of husband to take a second wife when his first wife is suffering from any long-standing disease other than the diseases mentioned in section 267. Except the Dhamma and Cittara, other texts cited thereunder definitely say that consent of the ailing wife must be obtained before the husband remarries. It will be seen that the Dhamma and Cittara in giving the husband the right to take a second wife, refer to the diseases mentioned in section 267, and as such, should have been cited under the latter rather than under section 311. The Kyaunet cited in section 311 gives the husband the right to take another wife without the consent of the ailing wife only after his third request for permission to do so is rejected by the latter.

In the writer's view, it is unsafe to say that a woman is barren simply because she has not produced any children. As contained in the text from the Manugye(1), unproductive marriage may be due to the barrenness of the wife or the sterility of the husband. It may also be due to some form of surgical operations performed on a woman to remove diseased organs which are necessary for conception, either before or after her marriage. There is no

(1) Section 220. K.M.D.(II).

no sure method of proving barrenness of woman. Even the lapse of eight years without producing a child after the marriage which the Dhammathats consider as a sign of barrenness(m) is far from being conclusive proof of that state in her. No doubt, a wife can be branded as being barren if her husband begets a child with another woman, but then this form of proof can only be furnished too late, i.e., after the husband has taken another wife.In an unreported case(n),the husband pleaded his wife's barrenness as an excuse for taking another wife. Heald and Rutledge,JJ., doubted,and rightly too,whether the wife's right of divorce against the erring husband is forfeited by her being barren, in the present state of Burmese society,and held that even if the husband can still be deemed to possess the right to marry a second wife on that ground, he cannot exercise it until atleast eight years' of married life have proved barren. In the circumstances, it is respectfully submitted that the ancient rule of the Dhammathats that a husband can marry a second wife without the first wife's consent if the latter is barren cannot still be considered as good law.

It may also be said that the prejudice against female children was never real among the Buddhists. This view finds support of the religious authority cited in the Manugye(o):

> " The above is the rule laid down in the Dhammathats, but according to the religious teachings, a woman who gives birth to daughters only cannot be said to be

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(m) Section 220. K.M.D.(II).
(n) Special Civil Second Appeal No.147 of 1925 of the Rangoon High Court.
(o) Section 266. K.M.D.(II).

"be inferior among women. Because, during the lifetime of Gotama Buddha, Visakha, Khema and Upalavanna, were born to King Kiki; and they distinguished themselves by remaining unmarried and devoting themselves to the practice of the religious precepts. Even a man would be accounted ignoble and worthless if he had no character, while a mere woman may be deemed noble and excellent if she is replete with virtue. The wise should take this also into consideration in deciding cases."

Thus, in view of this passage in the Manugye, it is very respectfully submitted that the husband's right to take a second wife without his first wife's consent cannot be supported as still prevalent among the Buddhists of today.

Sections 232, 267 and 311 of the Digest half-heartedly recognise the right of husband to marry another wife without the first wife's consent when the latter is suffering from contageous, loathsome, incurable or long-standing diseases. But inasmuch as a husband has an undeniable right to conjugal relations with his wife during the subsistence of the marriage, it is not, in the writer's view, unreasonable to give him the right to marry a second wife although the first wife does not consent to his exercising it, if it can be satisfactorily established that conjugal relations with the latter cannot be maintained except at the risk of impairing the health of either.

Section 268 of the Digest defines what is meant by a wife not behaving according to the rules of conduct governing her class within the meaning of section 219. According to the Dhamma cited in section 268, a wife who does not accord full marital

marital privileges to her husband also comes within that definition. The writer is of the opinion that the husband who is denied these privileges by his wife should be allowed to marry another against her will if necessary. The Manugye cited in the same section includes the wife who keeps a paramour or conceals property from her husband in the class of women who do not behave according to the rules of conduct. There can be no doubt that the husband can put away such a wife and marry another without her consent in that according to the settled law of the Dhammathats, a wife who commits adultery(p) and a wife who behaves like a thief(q) can be divorced by her husband. But it is submitted that ~~both~~ the charges of adultery or theft must be proved beyond doubt.

Section 269 of the Digest authorises the husband to divorce his wife who has no affection for him, but the text from the Dhammathatkyaw requires him to wait a year before he exercises his right. In the view of the writer, the excuse of want of affection is too vague to merit judicial recognition and it should not be accepted unless it is evidenced by some matrimonial fault. The chain that binds the couple is one of mutual forbearance, mutual endurance and mutual love and if that is broken, the marriage should dissolve.

The correctness of the decision in Maung Hme's case has not yet been definitely challenged by the Rangoon High Court in any reported case although twenty years have lapsed since it was made. Paucity of similar cases is in itself a definite proof that the institution of polygamy exists more in theory than in

(p). Sec. 256 & 269 K.M.D.(II) (q) Sec.260. K.M.D.(II).

in actual practice amongst the Buddhists.

Cruelty. There are ample provisions in the texts of the Dhammathats cited in sections 223 and 272 of the Kinwun Mingyi's Digest, Volume II, recognizing the husband's power of moderate chastisement with a split bamboo or a bight of a rope. "The wife is in the power of her husband " , so runs the common saying. The customary court seems to admit the use of such disciplinary proceedings by not interfering in the personal relations of husband and wife. " Never judge petty quarrels between husband and wife " was what the old people often said, and this saying appears to have been scrupulously observed by the Village tribunals which refused to hear any complaint on the part of the aggrieved women atleast so long as the punishment had not been of such a nature as to endanger life or limb. Even in the early days of British annexation, a single assault of the wife by her husband was not considered by the British Courts as constituting a valid ground for divorce(r), and in Maung Kywe v. Ma Thein Tin(s), Baguley,J., held that a single assault by a husband which was provoked by the wife, is not a sufficient ground for the granting of a divorce to the latter upon any terms when the character and habits of the husband are not of a nature to suggest any likelihood of repetition of the offence. His Lordship was of the opinion that a divorce canbe granted only for an act of cruelty and not for physical violence and that the essence of cruelty does not consist in violence, but in indifference to,or delight in another's pain. His Lordship observed obiter that a divorce is granted by the customary law not to punish the husband for

(r) Mi Pa Du v. Maung Shwe Bauk. S.J.p.607 @ 610.(s)7.Ran.p.790.

for an assault that is provided for by the penal law, but to enable the wife to liberate herself from a bond which bids fair to become intolerable.

It need not be actual physical cruelty; the Courts have gone beyond that primitive stage. Mere incompatibility of temper, quarrels and so forth do not constitute cruelty, nor is abuse or insolent outburst of temper unless they are persisted in to such an extent that there is a reasonable apprehension of danger or injury to health. But a course of conduct by a husband which is likely to injure his wife's health seriously may amount to cruelty; so will ill treatment of the children brought to the marriage by the spouse other than their parent, with the intention of causing mental pain or anxiety to, and in the presence of the latter It is submitted that communication of venereal disease to a wife by her husband, though it may not be wilful is legal cruelty. In Maung Po Aung v. Ma Nyein (t), it was held that a false accusation of adultery, if persisted in, might be sufficient to constitute cruelty in the legal sense to warrant a divorce. According to a recent decision (u) under the Indian Divorce Act, 1869, the conviction and imprisonment of a husband or wife for an offence against the Criminal law is no justification to the other party for refusing to live with him or her and however painful it may be for a respectable man to have a wife who has been convicted of a serious offence, such conviction does not justify him in

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(t) 10.B.L.R. p.132.

(u) Rev. Po Tun v. Ma Chit.R.L.R.(1939) p.1.

in deserting her. This principle of law should apply to the Buddhists who are governed by the Buddhist Customary Law. However, it is respectfully submitted that where a husband has been criminally convicted and the disgrace and shock to the wife are such as to cause a breakdown in her health, he can be adjudged guilty of legal cruelty. That is so under the English Law (v).

The writer is not aware of any reported cases in which a Buddhist husband sought divorce on ground of his wife's cruelty. Some writers therefore, think that cruelty is a monopoly of husbands. It is submitted that such a view is incorrect and that under certain circumstances, wives may also be found guilty of curelty.*

Kan-masat Divorce. Of the thirty-six Dhammthats digested by the Kinwun Mingyi, only the Manugye speaks about a divorce on ground of "kan-masat" and the English translation of the passage that refers to it(w) inter alia reads thus:

> " When the husband wishes to separate and the wife does not, or the wife wishes to separate and the husband does not, when there is no fault on either side, but their destinies are not cast together, the law for the partition of property is this: ....."

There was at one time a great controvery over the interpretation of the term " kan-masat " and it may be reasonably

(v) Thompson v. Thompson. (1901) 85.L.T.p.172.

(w) Section 3. Book XII. Manugye.

* See Section 304.K.M.D.(11).

reasonably said that it is yet unsettled although it was last discussed ten years ago by Page, C.J., in Maung Kywe v. Ma Kyin(x). The writer does not desire to reproduce at length the various contentions of the learned Judges and the text book writers on this point; only a brief discussion will suffice, in that he agrees with the Lord Chief Justice that even if such a divorce were permissible in days gone by, it is not countenanced by modern Buddhist society.

According to Dr. Forchhammer, the word " kan-masat " when applied to the question of divorce "cannot mean anything else than a desire of separation or divorce dictated by the fear of the faultless party to become co-parcener to the curse of retribution which with unerring certainty - the Buddhists have no Redeemer - will follow the evil deed committed by the faulty individual under their matrimonial contract; and what the sins are that admit of divorce is plain from the Dhammathats. * * * The words under comment ကံဖဝင် fully interpreted mean that a party to a matrimonial or other contract sees that through the commission of an atrocious act by the other party and by continuing to be partner to the contract, he is in danger of becoming involved in demeritorious deeds, which will reduce him to pain and misery for almost countless existences. * * * * But his desire to separate on account of ကံဖဝင် is dictated by the necessity to adjust his own kamma, which no other human or divine agency has the power to influence in the least. The nature of the act committed in the case of ကံဖဝင် must, inasmuch as it

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(x) 8. Ran. p. 411 @ 414.

it affects society or existing law, be dealt with separately; the deeds which justify a Buddhist to sever his destiny from that of his or her partner are matricide, parricide, killing, stealing, shedding the blood of the Buddha or rahan, heresy and adultery."

U May Oung, in his Leading Cases(y), criticised the views of Dr. Forchhammer pointing out that the words အပြစ်မရှိ (' a fault does not exist') appearing in the Manugye text are inconsistent with the notion of a fault or crime which the latter sought to read into the words "kan-masat" and that the assumption that one person may suffer retribution for the sin of another is also contrary to the teachings of the Buddha. He also questioned the authority for Dr. Forchhammer's list of deeds which will justify a Buddhist to sever his destiny from that of his or her partner. He next proceeded to recount five great sins - pancanantariya - namely, matricide, parricide, killing an arahat, shedding the blood of a Buddha, and causing dissension among the Sangha or priesthood, and observed that none of the said sins or any of the evil deeds mentioned by Dr. Forchhammer is to be found in the texts from the Dhammathats as a ground for divorce. He then gave his own interpretation of the term "kan-masat" as meaning that "the fortunes of the married pair are not linked together, i.e., the bad fortune of one is acting as a drag on the possible good fortune of the other." He continued: "Where a person finds after a period of married life that he is unable to make his way in the world or is continually suffering from misfortunes or illness or is, for some unascertainable reason, uniformally unhappy, then although no tangible fault

(y) Chapter on Divorce. pp.71-77.

fault can be ascribed to the other party, he feels that their ' destinies are not cast together ' , and therefore desires to separate. This sometimes happens in Burma, where a great many marriages are ' arranged ' by the parents on each side, regardless of the wishes of the prospective bride and bridegroom, or at best, with the approval of only one of them. Post-nuptial love cannot always be counted upon, and one or the other may after a time seek a dissolution. Where the other party can be persuaded to consent to a divorce, all goes well; otherwise unhappiness must ensue if the discontented party be not permitted to plead 'kan-masat' and forfeit all the joint property in so doing."

While it is true that the meaning of the word "kan-masat" is not clear, and the passage from the Manugye containing it is obscure, there can be little doubt that the words " no fault on either side" appearing therein refer to matrimonial fault only; consequently, it is respectfully submitted that "kan-masat" divorce can only be sanctioned for faults other than matrimonial faults, which will justify either spouse to reasonably apprehend that he or she will become involved in the misfortunes of the other arising out of them. It should not be supposed that according to the Buddhist teachings, a person can suffer retribution for the sin of another, but it should not be forgotten that husband and wife are peculiarly bound to each other so closely that so long as the marriage subsists between them, the sufferings of one are virtually the sufferings of the other and the evil consequences that may ensue to one

one from his or her evil deeds during his or her lifetime are bound to affect adversely the life of another even in the present existence. What those evil deeds are, U May Oung had rightly described, namely, pancanantariya kamma (z) the retribution for which must be suffered " without an interval ", i.e., even during this existence by the sinner. Hence, where the husband, for instance, commits any one of the five great sins (pancanantariya kamma), he is, according to the teachings of the Buddha, bound to suffer from its evil consequences during his lifetime and if the marriage is not dissolved, his wife will surely become involved therein, not by way of punishment for the sin of her husband, but merely because she happens to be a life-partner of the latter. It will be seen that none of the five great sins is a matrimonial fault; nevertheless, the innocent spouse may claim a divorce on the ground of "kan-masat", i.e., their fortunes are no more linked together. This explanation, if accepted, will bring the long disputed text from the Manugye within the bounds of reasonable understanding.

However, it remains to be seen how far a British Court will recognize the right of either spouse to claim a divorce on ground of "kan-masat". It seems inaccurate to treat this kind of divorce as a divorce on mere caparice inasmuch as the party seeking it is required to prove a wrong committed by the other which in no sense constitutes a matrimonial fault. That is, perhaps, the reason why the Dhammathats failed to mention the five great sins along with " six kinds of faults"(a), etc of a wife which under certain circumstances may constitute a

(z) See ante p.268 (a)Sec.272 & 273 K.M.D.(II).

a ground for divorce. The main distinction between matrimonial faults and the five great sins that justify "kan-masat" divorce is that the former involve a breach of duty as between spouses, whereas, the latter to constitute a wrong against a third party. But the very nature of the five great sins clearly suggests that a divorce petition founded on any one of them cannot be accepted by the British Courts at the present day. The offences of matricide and parricide if proved to have been committed by either spouse, will ordinarily entail the infliction of the extreme penalty of penal law for the time being in force, on the guilty spouse, and the dissolution of marriage must naturally follow a conviction for such crimes. The offence of killing of an arahat is more difficult to prove than matricide or parricide in that none can prove judicially who an arahat is. Nor can a spouse be guilty of the offence of shedding the blood of a Buddha at the present time inasmuch as there is no living Buddha; and the last sin of causing dissension among the Sangha can no longer be perpetrated for the simple reason that modern priesthood being merely a "samuti sangha" is not the Sangha contemplated by the sacred teachings of the Buddha. In the circumstances, these grounds for claiming a "kan-masat" divorce have become either redundant or obsolete, and the writer, therefore, respectfully submits that such a divorce is no longer prevalent at the present day.

Divorce on mere Caparice. The passage from the Manugye(b) dealing with "kan-masat" divorce was responsible for wrong decisions at one time in both Upper and Lower Burma that the husband or

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(b) Section 3. Book XII. Manugye.

or wife may sue and obtain a divorce on condition of surrendering all the joint property and paying the joint debts and the costs of litigation, where the other is without fault, and does not consent to it. The last decision to that effect was made by the Chief Court of Lower Burma in Ma Thein Mya v. Maung Tun Hla(c) which followed the decision of the Court of the Judicial Commissioner of Upper Burma in Mi Kin Lat v. Nga Ba Soe(d). There were however, decisions to the contrary in Lower Burma, in Nga Nwe v. Mi Su Ma(e) and Mi Pa Du v. Maung Shwe Bauk(f) both of which were much earlier than the above decisions ~~in date~~. It is respectfully submitted that the decision in Ma Thein Mya's case arose from wrong interpretation of the words " no fault on either side" appearing in the passage from the Manugye dealing with "kan-masat" divorce, the learned Judge construing the word "fault" as a "matrimonial" fault. A year later, a Division Bench of the Rangoon High Court definitely held in Ma Hmon v. Maung Tin Kauk(g) that where the couple are eindaunggyis, neither party has the right to insist on a divorce against the will of the other party, and without proof of misconduct or default of the other party, Heald,J., observing inter alia: " In my opinion, the right to divorce without fault, like a large number of other rights mentioned in the Dhammathats, has long been obsolete. It is not supported by custom; its resurrection in the British Courts for a few years, fifty or sixty years ago, was the result of a mere accident; if allowed, it would defeat the provisions of the law as to the maintenance of wives, and would practically destroy marriage

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(c) XI.L.B.R. p.385. (d) II.U.B.R.(1904-06) Div. p.3.
(e) S.J. p.391. (f) S.J. p. 607.
(g) 1. Ran. p.722.

the wife for one year, accompanied by the failure of the husband to maintain the wife during the specified periods of desertion; and

(2) Ordination of the husband without retaining an animus revertendi to lay state.

Desertion. The law on the point is contained in section 312 of the Kinwun Mingyi's Digest, Volume II. The text from the Manugye cited thereunder is more precise and clear than the texts from the other Dhammathats, and it is, therefore, reproduced here:

" Any husband and wife living together, if the husband, saying he does not wish her for a wife, shall have left the house, and for three years shall not have given her one leaf of vegetables or one stick of firewood, at the expiration of three years, let each have the right to take another wife or husband. If the wife, not having affection for the husband, shall leave the house where they were living together, and during one year he does not give her one leaf of vegetables, or one stick of firewood, let each have the right of taking another husband and wife; let them have the right to separate and marry again."

It should be noted that desertion to result in the automatic dissolution of marriage must be accompanied by neglect on the part of the husband to supply the wife with any materials whatsoever during the specified periods, whoever the deserter may be.

Until a Full Bench of the Chief Court of Lower Burma decided Thein Pe v. U Pet(j) in 1906, the common view was that the marriage

(j) 3.L.B.R. p.175. F.B.

marriage is ipso facto dissolved at the end of the specified periods of desertion, provided of course, that the husband's neglect to maintain the wife during such periods was also proved, and that no further act of volition by the aggrieved spouse showing an intention to treat the marriage as no longer subsisting was necessary. But in Thein Pe's case, it was held that some further act of volition was necessary before the marriage could be considered as having been dissolved. In Ma Nyun v. Maung San Thein(k), however, a full Bench of the Rangoon High Court dissented from the decision in Thein Pe's case and the theory of automatic dissolution of marriage was reaffirmed.

In Ma Saw Kin and others v. Maung Tun Aung Gyaw(l), their Lordships of the Privy Council expressed no opinion as to the correctness of the Full Bench decision in Ma Nyun's case, but observed obiter that provisions dealing with such a serious matter as the severance of the marriage tie must be construed strictly and fully complied with and that according to section 17 of Book V of the Manugye, unless the two conditions therein referred to exist, the text gives the wife no right to remarry and the marriage must be considered as subsisting.

It is not very easy to define the term "desertion". Neglect and contempt however hard to bear do not of themselves constitute desertion. Desertion, it is respectfully submitted, is not so much a withdrawal from a place as from a state of things. What the law seeks to enforce is recognition and discharge of certain obligations of the conjugal state. If a spouse renounces these, or without the consent of the other renders it impossible of

(k) 5.Ran. p.537 F.B. (l) 6.Ran. p.79. P.C.

of fulfilment, that is desertion. So it is if one of the spouses causes the other to live separate and apart. But these are what constitute desertion in the legal sense of the term. Hence, under the English Law, there may be legal desertion even while the couple are actually living in the same house. An English Court will, therefore, review the whole conduct of the parties in order to ascertain whether there has been desertion or not. But it appears that desertion under the Buddhist Customary Law is understood in a more limited sense. The wordings of section 17 of Book V of the Manugye which is reproduced in section 312 of the Digest clearly contemplate that one of the spouses must leave the house where they were living together to constitute desertion. But that is not all. The following ingredients must also exist:

(1) there must be express intimation given to the other spouse by the deserting spouse at the time of leaving him or her that his or her intention in so doing is to sever the marriage tie;

(2) the specified periods of one year and three years must have elapsed from the date of separation with the aforesaid intention, where the deserting spouse is the wife or husband, respectively; and

(3) the husband must have neglected or failed to maintain his wife throughout the aforesaid specified periods.

It will, thus, be seen that mere living apart for the prescribed period does not necessarily prove desertion by either party(m). And as Brown, J., rightly observed, Ma Nyun's case

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(m) Ma Nyun's case. 5.Ran.p.537. @ 552. F.B.

case has not defined the term "desertion". In an unreported case of Daw Kyin Hmon v. Daw Mya Gale(n), the parties to the marriage were of good social standing and they lived separately for over thirty years following the taking of a second wife by the husband. But neither the parties nor the witnesses who knew the facts of the case ever regarded the marriage as having been dissolved on ground of desertion.

The intention of the deserting spouse, in the writer's view, decides whether separate living constitutes desertion. The intention to sever the marriage tie must be expressed in unequivocal terms by the deserting spouse at the time of leaving the other. If it is expressed only at a later time, the commencement of the specified periods of one year and three years will be postponed to the date on which the deserted spouse has notice of such intention. If it is never expressed, the marriage will be regarded as subsisting irrespective of the length of separate living. Hence, where the parties live apart by mutual consent and the wife does not receive maintenance from her husband for a period exceeding three years, it cannot be said that the marriage has dissolved automatically. It is respectfully submitted that taking of a second wife by the husband or living with another man openly as man and wife, by the wife, does not in itself constitute sufficient notice to the other party that he or she intends to dissolve the marriage, inasmuch as polygamy is recognized and the husband may regard his wife's conduct as a simple act of adultery which does not ipso facto dissolve the marriage.

(n) Civil First Appeal No.18 of 1935 of the Rangoon High Court.

There must be no room for doubt in the mind of the parties as to the intention of one of them in leaving the other behind. The provisions of section 17 of Book V of the Manugye, as their Lordships of the Privy Council pointed out in Ma Saw Kin's case, must be strictly construed and fully complied with in that they deal with such a serious matter as dissolution of marriage. Desertion must, therefore, be a voluntary act. Separation due to imprisonment does not constitute desertion(o); nor does separation of wife from her husband due to the latter's cruelty amount to desertion(p).

Although it appears that the decision in Ma Nyun's case is correct in so far as it is consistent with the provisions of the Manugye Dhammathat, it is most respectfully submitted that the theory of automatic dissolution of the marriage on ground of desertion is incompatible with non-recognition of the right of divorce on mere caparice in Burmese Buddhist Law, inasmuch as Rutledge, C.J., and Carr, J., who inter alia formed the Full Bench that decided Ma Nyun's case expressed their views in Ma Kin v. Maung Po Sein(q) that automatic dissolution of marriage on the expiry of the prescribed periods is, in essence, a divorce at will. Moreover, with the advance of civilization, the institution of marriage came to be looked upon with greater respect than in olden days and its sanctity obtained the recognition of not only the contracting parties but also of the authorities who have to administer the Customary Law in relation to it. Thus, we find in the Rescript of King Bodawpaya issued in 1146 B.E (1784.A.D.) an order to this effect:

(o) Aung Byu v. That Hnin. 8.L.B.R.p.50 (q) 6.Ran. p.1.
(p) Ma Thein Me v. Po Gywe. 18.B.L.T.p.73.

" If either the husband or the wife desires to separate from the other against whom no fault can be imputed, but simply because there is no love between them, decision will be made against the party wishing the separation who shall also undergo corporal punishment(r)".

It will be noted that the Rescript ranks twenty-seventh in the list of thirty-four Dhammathats digested by the Kinwun Mingyi(s) and published atleast thirty-two years after the Manugye.

It has been said in the Chapter on the Dhammathats(t) that the British Courts in Burma are now bound to dispense justice in matters relating to marriage in accordance with Burmese Customary Law as it obtains today rather than by the little-known law of the Dhammathats which is in a great measure obsolete. Consequently, it will be necessary to find out how far the theory of automatic divorce finds acceptance in modern Buddhist society. The writer in his capacity as a judicial officer has instituted inquiries in various parts of the province where he has served for the past fourteen years, and their result, take it for all it is worth, invariably indicates that such theory is foreign to present day customs of the people. U E Maung is, therefore, absolutely correct in pointing out the anomalies that would arise from the recognition of such theory in the following terms: "A wife may not divorce her husband at will even on surrendering all her interest in the joint property; yet, she may by leaving the husband and keeping out of his way for a year obtain a dissolution of the marriage and claim at

(r) Sec.255 K.M.D(II). (s) See Appendix A .(t) Chapter VI.p.32.

"at the expiry of the period partition on the basis of a divorce by mutual consent. A decree for restitution of conjugal rights will be illusory; for if only the party against whom the decree is passed can evade the process of law for the prescribed periods, he or she may then come forward and claim that the decree has become inoperative(u)". Further, the doctrine of automatic divorce which in essence is a divorce at the will and pleasure of one party to the marriage, is wholly inconsistent with the Buddhist Customary Law that compels a husband to maintain his wife.*

In the circumstances aforesaid, it is most respectfully submitted that the theory of automatic dissolution of marriage at the expiry of the specified periods of desertion should not be regarded as finally settled as supposed by Ba U,J., in S.A.S.Chettyar Firm v. U Maung Gyi and another(v) and that there are sufficient grounds to reconsider the effect of the decision in Ma Nyun's case when opportunity arises.

Ordination. Ordination of the husband without retaining an animus revertendi to lay state causes an automatic dissolution of marriage. The law on the point is contained in section 411 of the Kinwun Mingyi's Digest, Volume II and section 321 of the Attasankhepa, but the opinions of the jurists are by no means unanimous. According to the texts from the Manugye and Dhamma, the wife is free to remarry after the lapse of seven days from the date of her husband's entry into the Buddhist priesthood and he shall have no right to claim her subsequently as his wife. The Mano, Kandaw, Vanna Dhamma, Rasi, Manu Vannana, Manu and Panam authorize the wife to take another husband on her husband becoming

(u) B.B.L. p.88. (v) 14.Ran.p.329. * See ante pp.193-195.

becoming a Buddhist monk, but allow the latter to reclaim her on his reversion to lay state and deprive him of such right only after he has entered and left the Order eight times. The Rajabala reduces the number of times the husband can enter and leave the Order without losing the claim to his wife to seven, whereas the Pyu and Sonda say that the husband's right to claim his wife shall be exercised within eight years from the date of his first entry into the Order. The Kungya, while allowing the wife to take another husband when her husband becomes a monk on the ground that there is no one to maintain her, lays down that the latter can claim her back presumably at any time and without restriction, for the sole reason that there has been no divorce.

The Manugye having been declared by the Privy Council as a text of paramount authority, appears to have been followed by the British Courts in Burma in preference to other Dhammathats and in Ma Shwe The v. Maung Kan(w), Duckworth, J., pertinently observed: " By becoming a monk, Maung Shwe Khaing divested himself of all earthly ties of relationship and property, and died a civil death* See the case of Ma Pwe v. Myat Tha(II.U.B.R.1897-01, p.54) and Shwe Ton v. Tun Lin (9.L.B.R.p.220 at 244). ... His wife even if not divorced, could after seven days, have married again. See (Manugye V, 17)."

In the view of the writer, the Court should look into the intention of the husband at the time of his entry into the Order

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(w) 1.Ran. p.430 @ pp 431-432.

* This decision in so far as it concerns the question of civil death must be deemed to have been superseded by a Full Bench decision of the Rangoon High Court in A.R.L.P.Firm v. U Po Kyaing (1939. R.L.R. p.311).

in deciding whether marriage still subsists between the parties notwithstanding the fact that the husband has entered the priesthood. If his intention is to renounce the world for good, there can be little doubt that marriage is dissolved automatically from the time of ordination, and whatever might have been the law in ancient days, it is respectfully submitted that the wife need not even wait until the expiry of seven days before she can remarry, as laid down in the Manugye and Dhamma Dhammathats. Thus, it has been rightly decided in Ma Thin v. Maung Maung(x) by Birks, J.C., that the husband's obligation to maintain his wife and child does not cease simply because he entered the priesthood for two months. The circumstances of the case indicate that the husband became a priest with no permanent intention to renounce the world but only to get rid of his obligation to maintain his wife under the order of a magistrate. The writer's view on the point finds support in the dictum of Mosely, J., in a recent but unreported case of U On Kin and another v. Daw On Bwin and others (y) wherein his Lordship said that the main question is one of intention and that he has not the slighest doubt that the term of seven days fixed by the Manugye has long become obsolete. "Cases ' observed his Lordship,' are common where a Burman Buddhist to stay in seclusion, for meditation or to acquire merit, enters a pongyi kyaung (monastery) for some little time for that purpose, without any intention whatever of renouncing his career in the world or his lay rights. It is almost universal for Burmans of position and respectability to do this (rahan tet thi or pazin khan thi) for some little time in their lives, early or late.

(x) P.J.p.611. (y) Civil First Appeal No.156 of 1935.

late. I have known cases where a clerk of the Court has done it for a month or two months, and it has never been contended that they lost any rights they possessed. I would note that one of the advocates arguing this appeal before us admitted that he had done this for nine days quite recently." Baguley,J., concurred with Mosely,J., in the views expressed. This kind of temporary renunciation is known as Dullabha rahan tet thi amongst the Buddhists. Hence, where a man enters the priesthood, only for a short period while retaining an animus revertendi to lay state, he resumes his original position in his family upon leaving the Order.*

Condonation. This should be defined as forgiveness of a conjugal offence with the full knowledge of all the circumstances; and whether there has been condonation is a question of fact and not of law. In other cases, condonation is a blotting out of the offence in order to restore the offending party to the same position he or she occupied before committing it. Mere forgiveness is not condonation; to be condonation, it must completely restore the party at fault to his or her previous position and must be followed by renewed cohabitation.

It has just been said that there cannot be condonation where the full facts are not known; hence, where the wife, for instance, committed adultery with two persons, but she confessed adultery with only one and was forgiven for that, there was no condonation yet of the undisclosed adultery.

Condonation may be by either spouse. Where the husband is the guilty spouse, condonation by his wife is not to be lightly presumed from a continuance of cohabitation subsequent to the

* See ante pp.222-224.

the commission of the marital offence against her. But where a husband continues to sleep with his wife in the same bed after he has full knowledge of the act of adultery committed by her, a strong presumption arises that he has condoned her fault(z).

There is an implied understanding that the offence condoned is not to be repeated. Thus, if a similar offence occurs on the part of the guilty spouse, the first offence is revived(a). Condonation, therefore, means a full forgiveness of a known conjugal offence on the implied condition that the misconduct condoned will not be repeated(b).

How to Seek Divorce. An action for divorce must be commenced by a plaint under the Code of Civil Procedure as it is of a civil nature(c). Where the suit is for bare divorce, a Court-fee of Rs.10 is payable. It may be instituted in a Township Court which is the lowest Court constituted under the Burma Courts Act,1922. It appears that even the Court of a Village Committee established under section 6 of the Burma Village Act,1907 has jurisdiction to sanction a divorce. A discussion on the point will be found in the Chapter on Matrimonial Courts(d). But it should be remembered that the Court Fees Act,1870 and the Suits Valuation Act,1887 do not apply to divorce suits instituted in the Court of a Village Committee.

(z) Ma San Shwe v. Maung Po Thaik. 8.B.L.R.p. 24.
(a) May Oung's L.C. p. 98.
(b) Ma San Shwe's case. Supra.
(c) Maung Soe Min v. Ma Ta. S.J. p.610.
(d) Ante pp.43-48.

PARTITION UPON DIVORCE.

It is now settled law that a bare suit for divorce lies under Burmese Buddhist Law. In Maung Pe v. Ma Lon Ma Gale(a), their Lordships of the Privy Council pointed out that the cause of action in a suit for divorce is quite distinct from that in a suit for partition, and as such, separate suits for divorce and partition can be entertained in that order. " The partition,' said their Lordships,'may no doubt be treated as relief consequential upon the divorce, and therefore, dealt with in the same suit, but the evidence is different, and the ground of divorce must be first and separately proved as a distinct cause of action before any question of partition can properly arise."

The rules of partition of property upon divorce vary according to the grounds for the dissolution of marriage. Thus, we have a separate set of rules governing the partition of property when the divorce is by mutual consent and when it is grounded upon a matrimonial fault of either spouse.

When the Divorce is by Mutual Consent.

Payin. Where both spouses brought Payin to the marriage, each will take back his or her own Payin. But where only one spouse brought property to the marriage and the other little or none, the rule of Nissaya and Nissita will apply to only Payin obtained by inheritance, and not that acquired by individual exertion which reverts to the owner. Where the rule is applicable, the supporter(nissaya) always gets double the share of the dependant (nissita). In Maung Shwe Tha v. Ma Waing (b), it was held that the rule does not apply in favour of a

(a) VI.L.B.R. p.18.P.C. (b) XI.L.B.R. p.48.

a spouse who gives away his or her property just before the marriage in order that he or she may not bring Payin to that marriage.

Atetpa. It reverts to its owner when divorce is by mutual consent.*

Hnapazon and Ordinary Lettetpwa. They will be divided equally between the spouses(c).

Lettetpwa by Succession. The party who inherited gets two-thirds and the other one-third(d).

Kanwin. This should be treated as Ordinary Lettetpwa and the spouses share it equally(e).

Where the divorce is by mutual consent, the rule of partition is the same, even if it were grounded on the misconduct of one of the parties(f).

When the Divorce is on ground of Misconduct.

Adultery of the Wife. The innocent spouse takes the whole of the joint property of the marriage(g). It is most respectfully submitted that the decision of Ba U,J., in S.A.S.Chettyar Firm v. U Maung Gyi and another(h) that the guilty wife forfeits her right only in the Hnapazon property is inconsistent with the penultimate clause of section 43 of Book XII of the Manugye which inter alia reads: " For this reason, let him take all the property, and have a right to put her away." The rule is the same whether the parties are ngelin-ngemaya or eindaunggyis(i). But there is an exception in the case of an eindaunggyi wife with regard to her Atetpa property which will revert to her notwithstanding the

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(c) See ante p.238. (d) See ante p.249.
(e) See ante p.243. (f) Ma Me Hla v. Maung Po Thon,7.Ran.p.98.
(g) Ma Dun Mai v. Maung San Tun. R.L.R.(1938) p.229.
(h) 14.Ran. p.329. (i) Ibid at p.333. * See ante p.248.

the fact that she is guilty of adultery(j). In Ma Dun Mai v. Maung San Tun (k), Dunkley,J., held that on the death of a husband, his heirs cannot claim partition of the estate as against the widow on the basis of her adultery, and that the penalty for adultery can be enforced only by the husband inasmuch as divorce is essentially a personal action.

Cruelty. Where divorce is granted on ground of cruelty, the rule of partition is the same as upon divorce by mutual consent(l). This is in accordance with the general rule of the Dhammathats as laid down in section 303 of the Kinwun Mingyi's Digest, Volume II.

Desertion. The rule of partition on the dissolution of marriage on ground of desertion is still obscure. Until 1922, the rule appears to be that the deserting spouse forfeits his or her interest in the property of marriage(m), but in U Pe v. Maung Maung Kha(n), their Lordships of the Privy Council held that a wife by merely deserting her husband does not commit a fault causing her to forfeit her interest in such property.

In Maung Po Nyun v. Ma Saw Tin(o), it was contended before their Lordships of the Privy Council that the husband who deserts his wife forfeits all claim to the property of marriage, but no authority for that proposition was cited. As a matter of fact, the wife who was the plaintiff in that case made no such claim in the plaint. In declining to accept the said contention , Sir

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(j) Maung Yin Maung v. Ma Soe.II.U.B.R.(1897-01) p.34. S.A.S.Chettyar Firm's case.14.Ran.329.
(k) R.L.R.(1938) p.229.(l) Mi Saing v.Nga Yan Gin.II.U.B.R(1914)127
(m) Ma Thet v.Ma San On.II.L.B.R.85.Ma Kin v.Mg Po Sein.6.Ran.p.1. Maung Po Nyun v. Ma Saw Tin. 3.Ran.p.160.
(n) 10. Ran. p.261. P.C. (o) 5. Ran. 841. P.C.

Sir Lancelot Sanderson who delivered the judgment of the Board said inter alia : " As already mentioned, the Dhammathats do not contain any text which provides that if the husband deserts his wife, or one of his wives, she is entitled to the whole of her husband's interest in the property..... If it had been the law that the husband would forfeit all his interest in the property, joint or separate, if he deserted his wife, or one of his wives, for three years and left her without maintenance, it is almost inconceivable that there would not have been found in the Dhammathats a statement of the law to that effect." The Board however, confirmed the decree of the Rangoon High Court giving the deserted wife a one-third share in what appears to be Lettetpwa of the marriage on grounds of equity, justice and good conscience. This decision was pronounced on the 26th.July 1927, but a Bench of the Rangoon High Court who decided Ma Kin's case(p) were not aware of it in time to follow it. *

In Ma Dun Mai v. Maung San Tun(q), Dunkley,J.,held that a wife who is guilty of desertion does not incur the penalty of forfeiture of the property of marriage and that the partition in such a case must be made in accordance with justice, equity and good conscience. His Lordship then divided the Hnapazon property in equal shares between the deserting wife and the sole heir of her deceased husband as if ~~they~~ there had been a divorce by mutual consent. It is respectfully submitted that this rule of partition is both fair and just, and is in accord with the views of modern Buddhist society.

(p) 6.Ran. p.1. (q) 14 (q) R.L.R.(1938).p.229 @ 235.

* Ma Kin's case was decided on the 8th.August,1927.

But where the couple are eindaunggyis, it should be remembered that Atetpa of either spouse will revert to its owner(r).

Partition where only one of the couple was previously married. Where one of the couple is an eindaunggyi and the other is a bachelor or a spinster, the partition shall be made as if they were a virgin couple(s).

Partition where the husband has married twice. The Dhammathats do not lay down any rule for partition on the divorce of the husband by one of two or more wives of equal status. It is, therefore, necessary to apply to such a case, the principles of justice, equity and good conscience, having regard ofcourse, to the general rules of Burmese Buddhist Law so far as those rules are applicable. Thus, in Maung Po Nyun v. Ma Saw Tin(t), it was held that if a Buddhist having a wife already, takes a second wife, the interests of the parties on the second marriage would be asfollows :

(1) In property brought by the husband to the first marriage, husband four-ninths, first wife three-ninths and second wife two-ninths;

(2) in property inherited by husband during the first marriage, husband four-ninths, first wife three-ninths and second wife two-ninths;

(3) in jointly acquired property of the first marriage, husband two-sixths, first wife three-sixths and second wife one-sixth;

(4) in property inherited by the husband after the marriage with second wife, husband two-thirds, first wife one-sixth and second wife one-sixth (u); and

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(r) See ante p.249. (s) Ma E Nyun v. Maung Tok Pyu. II.U.B.R. (1897-01).p.39.
(t) 3.Ran. p.160.
(u) C.T.P.V. Chettyar Firm v. Maung Tha Hlaing . 3. Ran. 322 .F.B.

(5) in jointly acquired property of the second marriage, husband one-third, first wife one-third and second wife one-third(v).*

In S.P.L.S.Chettyar Firm v. Ma Pu(w), Dunkley,J., rightly held that where a man had two wives and the first wife died, he became an heir of the first wife, and the second wife became entitled to one-third share in the property inherited by him from his first wife, i.e., the first wife's interests in the property of the marriage as stated above.

Thus, the property of marriage will be partitioned between the spouses according to their respective interests, when the divorce takes place by mutual consent. It is submitted that the rule of partition will be the same when partition is to be made on the basis of a divorce by mutual consent.

Payment of Debts on Divorce. Upon a divorce by mutual consent, the parties should discharge their joint-debts in proportion to their respective shares in the property of marriage(x).

(v) Maung Po Nyun v.Ma Saw Tin.3.Ran.p.160 @ 164.
(w) 14.Ran. p.697 @ 699. (x) Section 3.Book XII. Manugye.

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The decision in Maung Po Nyun's case was not brought to the notice of the Bench that decided C.T.P.V.Chettyar Firm's case (3.Ran.p.322) in which Carr,J., held that the share of two wives jointly in lettetpwa property of both marriages is the same as the share of one wife where there is a single wife. It will be noted that lettetpwa involved in that case was lettetpwa by succession of the husband and not ordinary lettetpwa.His Lordship referred to Manugye X,38 as authority for his decision that two wives of equal status share one-third interest in property inherited by the husband during second coverture, but that principle could not be found in the text cited. But in Ma Kin's case (6.Ran.p.1),the principle in C.T.P.V.Chettyar Firm's case was applied to ordinary lettetpwa, although their Lordships agreed that husband and wife always share such property equally,unlike in lettetpwa by succession to which the rule of Nissaya and Nissita applies. In S.P.L.S.Chettyar Firm's case(XIV.Ran.p.697),Dunkley,J., followed the Full Bench decision in C.T.P.V.Chettyar's case and declared that in ordinary lettetpwa of second marriage,husband takes one-half and the wives take one-quarter each.

EFFECT OF DIVORCE ON CHILDREN.

The rule for partition of children upon divorce by mutual consent is contained in sections 254 and 257 of the Kinwun Mingyi's Digest, Volume II and section 3 of Book XII of the Manugye. The father generally takes the male children and the mother the female children. In those days, the children were regarded more or less as chattels and the Dhammathats recognized the absolute right of the parents to sell them. But the sentiments of modern Buddhist society are entirely different; slavery has been abolished and children can no longer be sold to others. Nevertheless, the ancient rule that upon divorce, the sons follow the father and the daughters their mother and they ordinarily lose the right to inherit from the parent with whom they cease to live still holds good(a).

The view of Copleston,J., expressed in Mi San Mra Ri v. Mi Than Da U (b) that the children of separated parents are not entitled to inherit was based upon the wrong translation of Book X of the Manugye by Richardson as pointed out by U Tha Gywe in his Conflict of Authority, Volume II. The children of divorced parents are included in the class of heirs who are entitled to inherit(c).

The general principle of Buddhist Law is that upon divorce, the family is split into two branches and the child who belongs to one branch does not inherit from the other. Hence, a child that follows the father does not inherit from its mother unless it has maintained filial relationship with the latter(d). The

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(a) Ma Tin U v. Ma Ma Than, 5 Ran. 359. (b) I. L.R. p.161.
(c) Volume II. p. 119. (d) Mi Thaik v. Ma Tu. S.J.p.184. Ma Tin U's case. supra.

The children during their minority are bound by the choice of their parents, but if brought up by their mother during infancy as is generally the case, they are at liberty to rejoin the father's family when they attain the age of discretion(e). Thus, the lost right may be regained by what is usually described as resumption of filial relations. But in Ma Chit May v. Ma Saw Shin(f), Leach,J., held that the right can only be regained if the parent from whom the child was separated so wills it, and that a child who has lived with the mother since the divorce cannot be regarded as an heir of the father simply because it and its father have remained on terms of affection and it has continued to visit him. The father must take it back into his new family and treat it as his heir. His Lordship, therefore, held that the will of the father decides whether a child who goes away with its mother on divorce should inherit him. Consequently, a child who follows one of its parents on divorce is likened to a child given in adoption to another so far as the other parent whom it does not follow is concerned(g). The principle enunciated above applies with greater force in the case of a step-child of a divorced parent(h).

In Ma E Me v. Maung Po Mya(i),it was held that the mere fact that a person was a child at the time of his father's death and was, therefore, unable to express his option of renewing filial relations with him is not a sufficient ground for departing from the general rule that the child who follows the mother ceases to be an heir of his father.

(e) Mi San Mra Ri's case. ante p.291. (f)13.Ran. p.167 @ 171.
(g) Ma Yi v. Ma Gale. 6.L.B.R.p.167. (i) 11. B.L.R. p.316.
(h) Ma Shwe Yon v. Ma Waing. 4.Ran. p.412.

Where a person ceases to be an heir of his father for the reason that he has followed his mother after the divorce, he cannot inherit the estate of his half-brother in preference to his father(j).

In Mi Nyo v. Mi Nyein Tha(k), a daughter was born to the divorced wife after the divorce. She lived with her mother and never resumed filial relations with her father who was living with his sister. The father left no other wife or lineal descendants as his heirs. It was held that the daughter in the circumstances,was not excluded from inheriting her father's estate, and her share as against her aunt in her father's estate is one-half.

Guardianship of Children when there is a Dispute. It is generally supposed that guardianship of children is not one of the matters specified in section 13 of the Burma Laws Act(XIII of 1898).* In C.T.V.E.Vyravan Chettyar v. Ma Saw Mwe and others(l),it was observed by Cunliffe, Off. C.J.,that Buddhist Customary Law deals only with succession,inheritance,marriage, caste or any religious usage or institution and that none of those headings comprises guardianship. His Lordship held that Guardians and Wards Act,1890 applies to guardianship. U May Oung ,however, was of the opinion that " the question of custody of children as between their parents is a question concerning marriage and its incidents, and that therefore the Buddhist Law is applicable" (m). In the view of the writer,the dictum of the Lord Chief Chief Justice is more reasonable and correct.

(j) Le Maung v. Ma Kwe. X.L.B.R.107.(1) 12.Ran. p.47@ 49.
(k) II.U.B.R.(1904-06) Inheritance p. 15. (m) L.C. p. 114.
* See ante p.13,117 & 118.

APPENDIX. A.

List of Dhammathats as contained in the Kinwun Mingyi's Digest, Volume II, section 4 with dates of compilation in chronological order

Abbrieviated name.	Full name.	Date of compilation. B.E.	A.D.
1. Mano.	Manosara.	.....	.....
2. Manussika.	Manussika.	.....	.....
3. Pyu.	Pyumin.	89.	727.
4. Vilasa.	Dhammavilasa.	455.	1093.
5. Waru.	Waru.	643.	1281.
6. Kungya.	Dhammathat Kungya.	788.	1426.
7. Kaingza.	Kaingza Shwe Myin.	991.	1629.
8. Yazathat.	Mahayazathat.	991.	1629.
9. Myingun.	Myingun.	1012.	1650.
10. Dhammathatkyaw.	Dhammathatkyaw.	1095.	1733.
11. Dhamma.	Dhammavinicaya.	1114.	1752.
12. Manugye.	Manugye.	1114.	1752.
13. Kandaw.	Kandawpakeimakalinga.	1120.	1758.
14. Tejo.	Shintezawtharashwemyin.	1122.	1760.
15. Vammadhamma.	Vammadhammashwemyin.	1125.	1763.
16. Vammana	Manuvammana.	1126.	1764.
17. Manuyin.	Manuyin.	1129.	1767.
18. Rasi.	Vinicchayarasi.	1129.	1767.
19. Vinicchaya.	Vinicchayapakasani.	1133.	1771.
20. Manuvammana.	Manuvammana.	1134.	1772.
21. Pakasani.	Vinicchayapakasanilinga.	1139.	1777.
22. Vicchedani.	Mohavicchedani.	1139.	1777.
23. Rajabala.	Rajabala.	1142.	1780.
24. Sonda.	Sondamanu.	1143.	1781.
25. Manu.	Manu.	1143.	1781.
26. Panam.	Panam Pakinnaka.	1143.	1781.
27. Rescript.	Rescript(Amaindaw).	1146.	1784.
28. Kungyalinga.	Vinicchayakungya.	1165.	1803.
29. Dayajja.*	Dayajjadipani.	1173.	1811.
30. Warulinga.	Waru.	1184.	1822.
31. Dhammasara.	Dhammasaramanju.	1207.	1845.
32. Amwebon.*	Amwebon.	....	....
33. Cittara.	Manucittara.	....	....
34. Shinthapa.	Shinthapa.	....	....
35. Kyetyo.	Kyetyo.	....	....
36. Kyannet.	Kyannet.	....	....

* These Dhammathats contain only rules of inheritance. Hence, they are not cited in the Kinwun Mingyi's Digest Volume II which deals with Marriage only.

APPENDIX. B.

THE CHILD MARRIAGE RESTRAINT ACT.

(Act No.XIX of 1929).

An Act to restrain the solemnization of child marriages.

Whereas it is expedient to restrain the solemnization of child marriages; it is hereby enacted as follows:-

1. Short title extent and commencement. (1) This Act may be called "The Child Marriage Restraint Act 1928."

(2) It extends to the whole of British India, including British Baluchistan and the Sontal Parganas.

(3) It shall come into force from 1st April 1930.

2. Definitions. In this Act unless there is anything repugnant in the subject or context,

(a) "child" means a person who if a male is under eighteen years of age, and if a female is under fourteen years of age;

(b) "child marriage" means a marriage to which either of the contracting parties is a child;

(c) "contracting party to a marriage" means either of the parties whose marriage is thereby solemnized; and,

(d) "minor" means a person of either sex who is under eighteen years of age.

3. Punishment for male adult below twenty-one years of age marrying a child. Whoever being a male above eighteen years of age and below twenty-one, contracts a child marriage, shall be punished with fine which may extend to one thousand rupees.

4. Punishment for male adult above twenty-one years of age marrying a child. Whoever being a male above twenty-one years of age contracts a child marriage shall be punishable with simple imprisonment which may extend to one month or with fine which may extend to one thousand rupees or with both.

5. Punishment for solemnizing a child marriage. Whoever performs, conducts, or directs any child marriage, shall be punishable with simple imprisonment which extend to one month or with fine which may extend to one thousand rupess or with both, unless he proves that he had reason to believe that the marriage was not a child marriage.

6. Punishment for parent or guardian concerned in a child marriage. (1) Where a minor contracts a child marriage any person having charge of the minor, whether as parent or guardian or in any other capacity lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized or negligently fails to prevent it from being solemnized, shall be punishable with simple imprisonment which may extend to one month or with fine which may extend to one thousand rupees or with both:

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this Section, it shall be presumed unless and until the contrary is proved that where a minor has contracted a child marriage the person having charge of such minor has negligently failed to prevent the

the marriage from being solemnized.

7. Imprisonment not to be awarded for offences under Section 3. Notwithstanding anything contained in Section 25 of the General Clauses Acy 1897 or Section 64 of the Indian Penal Code, a Court sentencing an offender under Section 3 shall not be competent to direct that in default of payment of the fine imposed he shall undergo any term of imprisonment.

8. Jurisdiction under this Act. Notwithstanding anything contained in Section 190 of the Code of Criminal Procedure 1898 no Court other than that of a Presidency Magistrate or a District Magistrate shall take cognizance of, or try, any offence under this Act.

9. Mode of taking cognizance of offence. No Court shall take cognizance of any offence under this Act save upon complaint made within one year of the solemnization of the marriage in respect of which the offence is alleged to have been committed.

10. Preliminary inquiries into offences under this Act. The Court taking cognizance of an offence under this Act shall, unless it dismisses the complaint under Section 203 of the Code of Criminal Procedure 1898 either itself make an inquiry under Section 202 of that Code or direct a Magistrate of the First Class Subordinate to it to make such inquiry.

11. Power to take security from complainant. (1) At any time after examining the complainant and before issuing process for compelling the attendance of the accused, the Court shall, except for reasons to be recorded in writing, require the complainant to execute a bond with or without sureties for

for a sum not exceeding one hundred rupees as security for the payment of any compensation to the complainant may be directed to pay under section 250 of the Code of Criminal Procedure 1898 and if such security is not furnished within such reasonable time as the Court may fix the complaint shall be dismissed.

(2) A bond taken under this Section shall be deemed to be a bond taken under the Code of Criminal Procedure 1898 and chapter XLII of the Code shall apply accordingly.

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THE CHILD MARRIAGE RESTRAINT ACT XIX OF 1929.

(As amended by Acts VII & XIX of 1938)

Section 2 of the Child Marriage Restraint (Amendment) Act VII of 1938 makes the following addition to the Act -

To Sub-Section (2) of section I of the Act, the following shall be added, namely :

"and applies also to -

(a) all British subjects and servants of the Crown is any part of India, and

(b) all British subjects who are domiciled in any part of India wherever they may be,"

The Child Marriage Restraint (Second Amendment) Acy XIX of 1938 makes the following amendments in the Act :

Section 2 of this amending Act provides that :

In Clause (c) of Section 2 of the Act between the words "is" and "thereby" the words "or is about to be" shall be inserted.

Section 3 of this amending Act provides that :

In Section 8 of the Act for the words "District Magistrate" the words "Magistrate of the First Class" shall be substituted.

Section 4 of this amending Act provides that :

For section 9 of the Act the following shall be substituted, namely :

9. No Court shall take cognizance of any offence under this Act after the expiry of one year from the date on which the offence is alleged to have been committed"

Section 5 of this amending Act provides that :

For sub-section (1) of Section 11 the following shall be substituted, namely :

(1) When the court takes cognizance of any offence under this Act upon a complaint made to it, it may for reasons to be recorded in writing, at any time after examining the complainant and before issuing process for compelling the attendance of the accused, require the complainant to execute a bond, with or without sureties for a sum not exceeding one hundred rupees as security for the payment of any compensation which the complainant may be directed to pay under Section 250 of the Code of Criminal Procedure, 5 of 1898, and if such security is not furnished within such reasonable time as the Court may fix, the complaint shall be dismissed.

Section 6 of the Amending Act provides that :

12. Power to issue injuction prohibiting marriage in contravention of this Act. (1) Notwithstanding anything to the contrary contained in this Act, the Court may, if satisfied from information laid before it through a complaint or otherwise, that a child marriage in contravention of this Act has been arranged or is about to be solemnised, issue injunction against any of the persons mentioned in Sections 3, 4, 5 and 6 of this Act prohibiting such marriage.

(2) No injunction under sub-section (1) shall be issued against any person unless the Court has previously given notice to such person, and has afforded him as opportunity to show cause against the issue of the injunction.

(3) The Court may either on its own motion or on the application of any person aggrieved, rescind or alter any order made under Sub-Section (1).

(4) Where such an application is received, the Court shall afford the applicant an early opportunity of appearing before it either in person or by pleader, and if the Court rejects the application wholly or in part, it shall record in writing its reasons for so doing.

(5) Whoever knowing that an injunction has been issued against him under Sub-Section (1) of this Section disobeys such injunction shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both.

Provided that no woman shall be punishable with imprisonment.

APPENDIX. C.

BUDDHISTS MARRIAGE AND DIVORCE BILL NO. OF 192 .

Whereas it is expedient to define and amend the law relating to Marriage and Divorce amongst Buddhists; and whereas the previous sanction of the Governor-General has been obtained to the passing of this Act under section 80A, sub-section (3) of the Government of India Act; it is hereby enacted as follows :

Part I. Preliminary.

1. Short title, extent and commencement. (1) This Act may be called the Buddhists Marriage and Divorce Act, 192 .

(2) It shall extend to the whole of Burma but shall apply only to Buddhists.

(3) It shall come into force on such day as the Local Government may, by notification, direct.

2. Definitions. In this Act, unless there be anything repugnant in the subject or context -

(a) "eindaunggyi" means a person who marries again after dissolution of the first marriage either by death or divorce;

(b) "hnapazon property" includes -

(i) all profits or interests arising since marriage from the employment or investment of the separate property of either, and

(ii) all property acquired by their mutual skill and industry;

(c) "joint property" is the sum total of the hnapazon, payin and lettetpwa properties, and is impartible

impartible during the subsistence of the marriage;

(d) "lettetpwa property" means property acquired by the husband or wife after marriage and includes profits derived from the separate property of each;

(e) "payin property" is the property brought to the union by the husband and wife.

Part II. Marriage.

3. Conditions of valid marriage. After the commencement of this Act no marriage contracted between Buddhists shall be valid unless the following conditions are complied with, namely :

(i) the man must have completed the age of eighteen years and the woman the age of fourteen years;

(ii) there must not at the time be a valid marriage subsisting between either party and a third party;

(iii) both parties must be of sound mind;

(iv) the parties must not be related to each other in any degree of consanguinity set out in the Schedule;

(v) a bachelor or spinster must, if he or she has not completed the age of twenty years, have obtained the conse consent to the marriage of his or her father or, failing him, of his or her mother or, failing both, of his or her guardian de jure or de facto; provided (a) that such consent may be either express or implied; (b) that such subsequent ratification shall operate so as to validate the union from the date of its commencement.

4. Ceremony not essential for marriage. Marriage may be effected by the parties agreeing to take each other as husband and wife. Living together openly as husband and wife shall be presumptive evidence of marriage.

5. Incidents of marriage relating to property. (1) A marriage shall operate so as to create an impartible or joint interest between the parties of all joint property.

(2) The interest of the parties in the joint property shall be determined as follows:

(a) in the case of the payin property, the party who brought it to the union shall have a two-thirds interest and the other party a one-third interest;

(b) in other cases, each party shall have one-half interest.

6. Disposal of joint property. Neither the husband nor the wife, acting independently of one another, may convey by way of sale, mortgage or gift the joint property, and no such conveyance, whether of the whole or part only of such property, shall be valid. Provided that the joint property shall be liable for the debts contracted and liabilities incurred by one party if the debts were contracted or the liabilities incurred on behalf of both parties or with the knowledge and consent, either express or implied, of the other party.

Provided also that it shall be presumed, in the absence of evidence to the contrary, that debts contracted or liabilites incurred in the ordinary course of trade or business are contracted or incurred, as the case may be, on behalf of both parties.

Part III. Divorce.

7. When divorce follows automatically. Desertion for a period of three years by the husband and for one year by the wife shall effect a divorce automatically.

8. When divorce may be obtained. Divorce may be obtained -

(a) when the husband and wife mutually agree to a divorce;

(b) by a husband, on the ground of -

(i) adultery, or

(ii) the contracting of leprosy by his wife;

(c) by a wife, on the ground of -

(i) the contracting of leprosy by her husband, or

(ii) cruelty, which term includes legal and physical cruelty, on the part of her husband, or

(iii) her husband's remaining in the priesthood for seven days or more against her wishes.

9. Partition of property on divorce. (1) In the case of a divorce either by mutual consent or by reason of one of the parties contracting leprosy, the joint property shall be divided between the husband and wife in accordance with the interest of each party as defined in section 5, sub-section (2).

(2) In the case of a divorce effected automatically under the provisions of section 7, the deserting party shall forfeit all his or her interest in the joint property and shall also be liable for the payment of all joint debts.

(3) Where divorce is effected on account of adultery committed by the wife or on account of adultery coupled with cruelty, committed by the husband, the party at fault shall

shall forfeit all his or her interest in the joint property and shall also be liable for the payment of all debts; provided that, where both parties are eindaunggyis, each party shall take back his or her payin property.

(4) Where divorce is effected on account of cruelty, each party shall be entitled to one half of the joint property.

(5) Where divorce is effected on account of the husband remaining in the priesthood for seven or more days against the wishes of his wife, the wife shall be entitled to all the joint property but she shall be liable for the payment of all joint debts.

...

SCHEDULE

Section 3(iv)

TABLE OF PROHIBITED DEGREES.

A man may not marry his	A woman may not marry her
1. Grandmother.	1. Grandfather.
2. Grandfather's wife.	2. Grandmother's hasband.
3. Wife's grandmother.	3. Husband's grandfather.
4. Father's sister.	4. Father's brother.
5. Mother's sister.	5. Mother's brother.
6. Mother.	6. Father.
7. Step-mother.	7. Step-father
8. Wife's mother.	8. Husband's father.
9. Daughter.	9. Son.
10. Wife's daughter.	10. Husband's son.
11. Son's Wife.	11. Daughter's husband.
12. Sister.	12. Brother.
13. Son's daughter.	13. Son's son.
14. Daughter's daughter.	14. Daughter's son.
15. Son's son's wife.	15. Son's daughter's husband
16. Daughter's son's wife.	16. Daughter's daughter's husband.
17. Wife's son's daughter.	17. Husband's son's son.
18. Wife's daughter's daughter.	18. Husband's daughter's son.
19. Brother's daughter.	19. Brother's son.
20. Sister's daughter.	20. Sister's son.

APPENDIX. D.

THE BUDDHIST WOMEN'S SPECIAL MARRIAGE AND SUCCESSION ACT.

Burma Act XXIV, 1939 (30th December 1939)

1. Commencement of Act. This Act shall come into force on the 1st April 1940.

2. Definitions. In this Act, unless there is anything repugnant in the subject or context -

(i) "a Buddhist Woman" means a woman belonging to any of the indigenous races of Burma, who professes the Buddhist faith; and

(ii) "Registrar" means a Registrar of Marriages under this Act.

3. Registrar of Marriages. (1) All village headmen shall be Registrars of Marriages under this Act and the Governor may appoint any Magistrate to be a Registrar of Marriages for any area where there are no village headmen. The Registrars shall be supplied with notice forms and marriage certificate registers and shall be authorized to receive the fees chargeable under this Act.

(2) All Registrars shall be deemed to be public servants.

4. Marriage before whom solemnized. Notwithstanding the provisions contained in section 4 of the Christian Marriage Act, a marriage under this Act may be solemnized before a Registrar in the manner hereinafter provided.

5. Who may contract marriage. A man not below the age of 18 and a woman not below the age of 16 may contract a valid marriage, provided -

(a) the parties are of sound mind,

(b) in the case of a party under the age of 20, the express consent of the father or mother, or if they be dead, of the guardian de facto or of the guardian de jure, if any, has been obtained,

(c) in the case of a woman, there is no valid subsisting marriage.

6. Notice of intended marriage. Whenever a non-Buddhist man and a Buddhist woman intend to contract a marriage they shall give notice in writing in the form prescribed in the Schedule to the Registrar within whoses jurisdiction one of them has resided for 14 days before such notice is given. The notice form may be obtained from the Registrar on application.

7. Signing of declaration prescribed in notice. Any person giving notice under section 6 shall sign the declaration prescribed in the notice in the presence of two witnesses and the Registrar before whom the marriage is to be solemnized.

8. Fee. A fee of Rs.5 for every marriage shall be payable to the Registrar at the time of giving notice under section 6.

9. Publication of Notice. The Registrar shall cause the notice to be published -

(a) by affixing a copy thereof at some conspicuous place in his office; and

(b) by having a copy thereof served in the manner of service of summons or notices under the Code of Civil Procedure -

(i) if one of the parties is under 20 years of age, on the parent or guardian, as the case may be, of such party; and

(ii) if the woman had already married a man, on such man:

Provided that the Registrar may, if the residence of any person to be served with a copy of the notice is beyond the limits of his jurisdiction, send a copy to him by registered post or by a messenger.

The Registrar shall fill in the particulars in the certificate at the foot of the original notice in the prescribed form.

10. Solemnization of marriage if no objection. Fourteen days after notice of an intended marriage has been given under section 6 such marriage may be solemnized by the Registrar, unless it has been previously objected to in the manner hereinafter mentioned.

11. Objection. Any person may in writing addressed to the Registrar object to the intended marriage of which notice has been given on the ground that it would contravene one or more of the conditions prescribed in section 5.

12. Procedure on receipt of objection. Court of competent jurisdiction. (1) On receipt of the objection the Registrar shall refer the objector to a Court of competent jurisdiction and shall postpone the solemnization of the marriage for 14 days, if such Court be open at the time, and, if not, until the lapse of 14 days from the opening of such Court; provided

provided that the Registrar may on the application of the objector further postpone such solemnization for a period not exceeding 14 days on any ground which the Registrar may deem reasonable.

(2) The Court of competent jurisdiction under sub-section (1) shall be the District Court or the Original Side of the High Court within whose jurisdiction the Office of the Registrar is situate.

13. Application to Court for order as to whether intended marriage is or is not a proper marriage. (1) The objector may file an application before a Court of competent jurisdiction for an order as to whether such intended marriage is or is not a proper marriage.

(2) The Court shall give the applicant a certificate to the effect that such an application has been filed by him.

(3) If the certificate given by the Court is lodged with the Registrar within the time granted by him under sub-section (1) of section 12, the Registrar shall not solemnize the marriage unless and until he receives an order from the Court that it is a proper marriage.

If the certificate is not lodged with the Registrar within the time granted by him, the Registrar shall, if so desired by the parties solemnize the marriage.

(4) The Court shall after examining the allegations contained in the application and hearing the evidence produced by the parties in a summary way, decide whether the intended marriage is or is not a proper marriage and

and shall pass an order accordingly. Such order shall be final.

(5) The Court shall forthwith send a copy of its order to the Registrar.

(6) If the Court orders that the intended marriage is a proper one, the Registrar shall, if so desired by the parties, solemnize it.

If the Court orders that the intended marriage is not a proper one, the Registrar shall not solemnize it.

14. Penalty for wrongful objection. Any Court in which an application under section 13 is filed may, if it appears that the objection is not reasonable and bona fide, inflict a fine not exceeding Rs.500 on the applicant and award the whole or any part of it to the parties to the intended marriage.

15. Petition where person whose consent is necessary is insane or unjustly withholds consent. Procedure on petition. If any person whose consent is necessary to any marriage under this Act is of unsound mind, or if any such person (other than the father) without just cause withholds his consent to the marriage, the parties intending marriage may apply by petition to a Court of competent jurisdiction, and such Court may examine the allegations in the petition in a summary way;

and, if upon examination, such intended marriage appears proper, such Court shall declare it to be a proper marriage.

Such declaration shall be as effectual as if the person whose consent was needed had consented to the marriage.

16. Manner of solemnization of marriage. Every marriage under this Act shall be solemnized in the presence of the Registrar and of two witnesses who shall attest the marriage certificate register referred to in section 17. It may be solemnized in any form provided that each party says to the other in the presence and hearing of the Registrar and of the witnesses "I, A.B., take thee, M.S., to be my lawful wife (or) husband."

17. Marriage Register. When the marriage has been solemnized as above, the Registrar shall enter the particulars in quadruplicate in a register called "The Marriage Certificate Register" which shall be in the form contained in the Schedule annexed hereto and such register shall be signed by the parties to the marriage, the witnesses and the Registrar.

18. Custody of Certificates, etc. (1) The Registrar shall deliver one of the certificates to the husband, another to the wife or, if either of them is under 20 years of age, to his or her parent or guardian, forward the third to the Deputy Commissioner in accordance with sub-section (2), and retain the fourth.

(2) The Registrar shall forward the notice under section 6, one marriage certificate and all other documents relating to the marriage through the Township Officer to the Deputy Commissioner of his District within a week of the marriage, and the said documents shall be filed in the

the register of marriages and kept in the Office of the Deputy Commissioner permanently.

19. Marriage Register and other documents to be open to inspection. The register of marriages and other documents appertaining thereto shall at all reasonable times be open to inspection and certified copies thereof shall, on application, be supplied by the Deputy Commissioner on payment to him by the applicant of a fee at the rate fixed by the Governor.

20. Evidence of Marriage. Certified copies of documents relating to marriages under this Act shall be received in evidence without further proof.

21. Information regarding cohabitation. (1) A Buddhist woman or her parent, guardian, brother or sister may give information to a Registrar within whose jurisdiction she resides that she has been cohabiting with a non-Buddhist without being legally married to him. The Registrar shall record the information or cause it to be recorded and all the information so recorded shall be signed by the informant.

(2) Registrar to summon parties and explain provisions of Act. The Registrar shall then summon both the Buddhist woman and the non-Buddhist man to appear before him on a date fixed by him and on their appearance explain to them the provisions of this Act relating to marriage and if both the parties wish to contract a marriage the Registrar shall proceed as prescribed in sections 6, 7, 8, 9 and 10. If either party is unwilling to contract a marriage, the

the Registrar shall explain to the willing party that the marriage cannot be solemnized as both the parties do not agree to the proposed marriage but that the willing party may file a suit in a Civil Court for damages for breach of promise of marriage or seduction or both as the case may be.

22. Presumption regarding promise of marriage. (1) In the absence of any agreement in writing to the contrary a promise of a non-Buddhist to marry a Buddhist woman shall be deemed to be a promise to marry her under this Act.

(2) Such a promise shall be presumed juris et de jure if the parties have lived together under such circumstances that they would have been husband and wife according to Burmese Buddhist Law if both of them had been Burmese Buddhists.

23. Effect of marriage of member of undivided family. The marriage under this Act of any member of an undivided family who professes the Hindu, Sikh, or Jaina religion shall be deemed to effect his severance from such family and in case of his death before partition, his vested right shall devolve on his wife and children.

24. Ownership of properties. All questions relating to the ownership of properties of the parties to the marriage contracted under this Act shall be decided according to the Burmese Buddhist Law as if the parties were Burmese Buddhists.

25. Law of Divorce. The Burmese Buddhist Law of Divorce shall apply to marriages contracted under this Act as if the

the parties were Burmese Buddhists.

26. Law of Succession and Inheritance. The Burmese Buddhist Law of Succession and Inheritance shall apply to properties of the parties who marry under this Act as if they were Burmese Buddhists.

27. Legitimacy of children. If a marriage is solemnized under this Act, any child born of the couple before the marriage shall be deemed legitimate.

28. Penalty for false declaration or certificate. Any person making, signing or attesting any declaration or certificate prescribed by this Act containing a statement which is false and which he either knows or believes to be false or does not believe to be true shall be deemed to have committed an offence under section 199 of the Penal Code.

29. Penalty for wrongful actions of Registrar. Any Registrar who knowing and wilfully solemnizes a marriage under this Act -

(i) without publishing the notice regarding such marriage as required by section 9, or

(ii) within 14 days after receipt by him of notice of such marriage, or

(iii) when one of the parties to the marriage is under 20 years of age, without the required consent of the parent or guardian of such party having been obtained, or

(iv) in contravention of the provisions of sub-section (1) of section 12 or of sub-section (3) or sub-section

sub-section (6) of section 13,

shall be punished with imprisonment for a term which may extend to one year and shall also be liable to fine not exceeding rupees five hundred.

30. Rules. The Governor may make rules for the disposal of the fees mentioned in section 8, the supply of registers, forms, certified copies and the preparation and submission of returns of marriages solemnized under this Act.

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